Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-218

CARBON FUEL COMPANY, *Petitioner,*

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, and UNITED MINE WORKERS OF AMERICA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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No.

CARBON FUEL COMPANY, *Petitioner,*

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, and UNITED MINE WORKERS OF AMERICA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Petitioner, Carbon Fuel Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia entered in this proceeding on May 9, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is attached hereto in its entirety as Appendix A. The opinion of the Interior Board of Mine Operations Appeals of the United States Department of the Interior, 6 IBMA 20 (1976), is attached hereto in its entirety as Appendix B. The unreported opinion of

the administrative law judge is attached hereto in its entirety as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was entered on May 9, 1978. A timely petition for rehearing was denied on May 31, 1978, and this petition for certiorari was filled within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Is not a mine operator entitled to a review of the merits of a notice of violation issued by a mine inspector alleging a failure to construct facilities prior to (1) being forced to construct such facilities or (2) being issued an order closing the mine for an intentional failure to construct the facilities, thereby exposing himself to potential criminal liability?

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATUTORY PROVISIONS INVOLVED

The Court of Appeals' decision was based upon the provisions of the Federal Coal Mine Health and Safety Act of 1969 (hereinafter the "1969 Act"), 30 U.S.C. § 801 *et seq.* (1970). The 1969 Act was recently amended by the Federal Mine Safety and Health Amendments Act of 1977 (hereinafter the "1977 Act"), Pub. L. No. 95-164, tit. II, § 201, 91 Stat. 1290, 30 U.S.C.A. § 801 *et seq.* (Supp. 1978), which transferred jurisdiction of mine safety and health matters to the Department of Labor and created the independent Federal Mine Safety and Health Review Commission to review controversies arising under the 1977 Act. The provisions of the 1969 Act relevant herein were altered by the 1977 Act to accommodate these changes, but no other substantive changes were apparently made. For the convenience of the Court, the relevant provisions of both the 1969 and 1977 Acts are reprinted below.

Section 105(a)(1) of the 1969 Act, 30 U.S.C. § 815(a)(1) (1970) [current version at Pub. L. No. 95-164, tit. II, § 201, 91 Stat. 1305-06, 30 U.S.C.A. § 815(d) (Supp. 1978)], provided:

> "(a)(1) An operator issued an order pursuant to the provisions of section 104 of this title, or any representative of miners in any mine affected by such order or by any modification or termination of such order, may apply to the Secretary [of the Interior] for review of the order within thirty days of receipt thereof or within thirty days of its modification or termination. An operator issued a notice pursuant to section 104(b) or (i) of this title, or any representative of miners in any mine affected by such notice, may, if he believes that the period of time fixed in such notice for the abatement of the violation is unreasonable, apply to the Secretary for review of the notice within thirty

days of the receipt thereof. The applicant shall send a copy of such application to the representative of miners in the affected mine, or the operator, as appropriate. Upon receipt of such application, the Secretary shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing, at the request of the operator or the representative of miners in such mine, to enable the operator and the representative of miners in such mine to present information relating to the issuance and continuance of such order or the modification or termination thereof or to the time fixed in such notice. The filing of an application for review under this subsection shall not operate as a stay of any order or notice."

Section 105(b) of the 1969 Act, 30 U.S.C. § 815(b) (1970) [current version at Pub. L. No. 95-164, tit. II, § 201, 91 Stat. 1305-06, 30 U.S.C.A. § 815(d) (Supp. 1978)] provided:

"(b) Upon receiving the report of such investigation, the Secretary shall make findings of fact, and he shall issue a written decision, incorporating therein an order vacating, affirming, modifying, or terminating the order, or the modification or termination of such order, or the notice, complained of and incorporate his findings therein."

Sections 105(a)(1) and (b) of the 1969 Act were amended by Section 105(d) of the 1977 Act, Pub. L. No. 95-164, tit. II, § 201, 91 Stat. 1305-06, 30 U.S.C.A. § 815(d) (Supp. 1978), which provides:

"(d) If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary [of Labor] that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104."

STATEMENT OF THE CASE

This action was initiated by Carbon Fuel Company (hereinafter "the Company") before the Secretary of the Interior under Section 105 of the 1969 Act [30 U.S.C. § 815]. The Company sought review of a notice of violation issued under Section 104(b) of the 1969 Act [30 U.S.C. § 814(b)] for an alleged violation of 30 C.F.R. § 75.1712-2, which provides:

"Bathhouses, change rooms, and sanitary toilet facilities shall be in a location convenient for the use of the miners. Where such facilities are designed to serve more than one mine, they shall be

centrally located so as to be as convenient for the use of the miners in all the mines served by such facilities."

The notice of violation alleged that the bathhouse serving the No. 6A-23 Drift Mine [1] was inconvenient for the miners, and gave the Company one month to abate the alleged violation by building a convenient bathhouse. The Company's application for review alleged that the time fixed for abatement was unreasonable, and that any time for abatement was unreasonable because the notice of violation was invalid.

The bathhouse in this case was constructed by the Company in 1967 along Field's Creek in the area of Winifrede, Kanawha County, West Virginia. The Company currently operates approximately six mines in this area and several other facilities, including a shop, supply house and cleaning plants. The bathhouse was designed to serve all of these mines and facilities, and was constructed at its present location because the site is centrally located to the Company's remaining coal reserves in the area. In addition, the site provides access to a good water supply, sufficient parking space and an adequate power supply, is directly across from the Company's store which provides additional security for the miners' personal possessions stored in the

[1] Production in the No. 6A-23 Drift Mine was discontinued on July 11, 1978, as a result of current mining economics. Miners are still employed and working in the mine, and the Company still operates five other mines in the vicinity which are served by the same bathhouse. All of these other mines are comparable distances from the bathhouse, and are therefor subject to the same allegation that the bathhouse is inconvenient. Accordingly, even if production is not resumed in the No. 6A-23 Drift Mine in the future, the validity of the notice of violation remains a crucial issue to the Company's continued operations in the area.

bathhouse, and is passed by the miners who utilize the bathhouse facilities on their way to and from work. Finally, the portals or openings in this area are short-lived [2] because the terrain consists of ridges and valleys with splits in the coal seams caused by valleys cutting through the seams, and the central location of the bathhouse maintains a continuity of bathhouse facilities for the men moving from opening to opening.

The United Mine Workers of America (hereinafter "UMWA") and the Mining Enforcement and Safety Administration of the Department of the Interior (hereinafter "MESA"), filed answers in opposition to the Company's application for review.

After expedited hearing, an administrative law judge issued a decision in which he determined the Company's bathhouse to be convenient and held that the notice of violation was invalid (Appendix C).

MESA and the UMWA appealed the administrative law judge's decision to the Interior Board of Mine Operations Appeals (hereinafter the "Board"), which rendered an opinion and decision affirming the administrative law judge's decision (Appendix B). The decision of the Board was the final decision of the Secretary of the Interior.

The UMWA sought review of the Board's decision in the Court of Appeals for the District of Columbia pursuant to Section 106(a) of the 1969 Act [30 U.S.C. § 816(a) (1970) (current version at Pub. L. 95-164, tit. II, § 201, 91 Stat. 1306, 30 U.S.C.A. § 816(a)(1) (Supp. 1978))]. The Court of Appeals reversed

[2] During the past 20 years the Company has opened and closed approximately 37 mines in this area. The length of operation of these mines has ranged from 13 years to 4 months, with an average life span of 2 years and 10 months.

the decision of the Board. In so doing, the Court of Appeals did not discuss the merits of the notice of violation. Instead, it ruled that a mine operator issued a notice of violation could obtain review in a Section 105 proceeding only of the time fixed by a mine inspector for abatement of the notice, and that the Board was without jurisdiction to determine the validity of the notice (Appendix A, pp. 2a, 15a). In effect, the Court of Appeals held that an operator issued a notice of violation must either (1) correct the alleged violation prior to a determination of its validity or (2) disregard the citation and thereby subject himself to an order closing his mine and potential criminal liability for an intentional violation of the law.

The Court of Appeals based its decision primarily on the legislative history of the 1969 Act, placing greater emphasis on such history than on contrary decisions and statements of this Court, the Courts of Appeals for the Third and Fourth Circuits, the District Court for the Western District of Pennsylvania and the Board (Appendix A, pp. 11a-12a, 13a n.50).

Prior to the decision by the Court of Appeals, the 1969 Act was amended by the 1977 Act. Although the language of the relevant provisions herein was modified by the amendments, the Court of Appeals found nothing in the amendments to change its view of how the 1969 Act would operate and specifically pointed out that enforcement proceedings under the 1977 Act were "patterned on the current Coal Act" (Appendix A, pp. 2a-3a n.3, *citing* S. Rep. No. 181, 95th Cong., 1st Sess. 12 (1977), [1977] U.S. Code Cong. & Ad. News 5193, 5204).

REASONS FOR GRANTING THE WRIT

1. The Construction Given Section 105 of the 1969 Act by the Court of Appeals, Which Construction Prohibits Administrative Review of the Merits of a Notice of Violation, Conflicts With All Reported Decisions of This and Other Courts Concerning the Scope of Review Under Section 105, and Is Clearly Wrong.

In *National Independent Coal Operators Ass'n* v. *Kleppe,* 423 U.S. 388 (1976), this Court stated:

> "Under § 105, 30 U.S.C. § 815, an operator may apply to the Secretary [of the Interior] for review of the factual basis of any order or notice issued under § 104, or for review of the amount of time allowed for abatement of violations."

Id. at 391. No clearer statement concerning the scope of review under Section 105 could be made, particularly since this Court carefully delineated two types of review for Section 104 notices of violation, "review of the factual basis" and "review of the amount of time allowed for abatement of violations." The Court of Appeals avoided this definitive statement of the scope of Section 105 review by characterizing the statement as a "casual description" (Appendix A, p. 13a n.50). The resulting conflict in decisions, based upon a presumption of error on the part of this Court in a so-called "casual description," warrants review and clarification.

Such review is further warranted in light of the fact that this Court's construction of Section 105 is unanimously followed by all other reported decisions, including those of the agency charged with administering the 1969 Act. The Board was the first to construe Section 105 of the 1969 Act in *Freeman Coal Corp.,* 1 IBMA 1 (1970). In *Freeman,* the Board held that Section 105 review of the reasonableness of the time

fixed for abatement of a notice of violation required initial re.iew of the merits of the violation alleged in the notice. The Board's holding was based upon the logical "proposition that any time for abatement is an unreasonable time if no violation exists." *Id.* at 27. The Board's construction of Section 105 has been specifically approved by the United States Courts of Appeals for the Third and Fourth Circuits. *Lucas Coal Co.* v. *Interior Bd. of Mine Operations Appeals,* 522 F.2d 581, 583, 587 (3d Cir. 1975); *Kanawha Coal Co.* v. *Andrus,* 553 F.2d 361, 363 (4th Cir. 1977).

The United States District Court for the Western District of Pennsylvania has also considered the scope of review under Section 105 in *Lucas* v. *Morton,* 358 F. Supp. 900 (W.D. Pa. 1973). *Lucas* involved a constitutional challenge to the enforcement scheme of Section 105, and in particular, the fact that Section 105 could be read and applied to prohibit review of the merits of notices of violation. If so read, an operator issued an invalid notice of violation would be forced either to undertake erroneously required abatement action or accept a withdrawal order closing his mine for failure to abate, before being entitled to a hearing on the merits of the notice.[3] Plaintiffs in *Lucas* argued that such a construction of Section 105 deprived them of property without due process. The district court

[3] After abatement of a violation, an operator is entitled to challenge the fact of violation in a civil penalty proceeding. 1969 Act § 109(a)(3), 30 U.S.C. § 819(a)(3) (1970) [current version at Pub. L. No. 95-164, tit. II, § 201, 91 Stat. 1305-06, 30 U.S.C.A. § 815(d) (Supp. 1978)]. A withdrawal order issued for failure to abate a notice of violation is subject to review in a Section 105 proceeding. 30 U.S.C. § 815(a)(1) (1970) [current version at Pub. L. No. 95-164, tit. II, § 201, 91 Stat. 1305-06, 30 U.S.C.A. § 815(d) (Supp. 1978)].

agreed that serious due process problems existed, but avoided declaring Section 105 unconstitutional by concluding, as was done in the cases discussed *supra,* that Section 105 permitted review of the merits of a notice of violation.

The construction given Section 105 in the aforementioned decisions is clearly supported by the language of the 1969 Act, which provides in pertinent part:

> "(a)(1) An operator issued a notice pursuant to Section 104(b) . . . may, if he believes that the period of time fixed in such notice for the abatement of the violation is unreasonable, apply to the Secretary for review of the notice within thirty days of the receipt thereof. . . ."

Plainly read, this language permits an operator to seek review of a Section 104(b) notice of violation "if he believes that the period of time fixed in such notice for the abatement of the violation is unreasonable." The language does not limit the rationale underlying a mine operator's belief of unreasonableness, nor does it restrict the Secretary's "review of the notice." Indeed, Section 105(b) of the 1969 Act specifically authorizes the "vacating, affirming, modifying or terminating" of notices of violation by the Secretary after review thereof. If anything, this language makes it clear that Section 105 contemplates review of the merits of a Section 104(b) notice because such "vacating" or "terminating" can occur only after a finding by the Secretary that the violation alleged in the notice did not exist.

2. The Construction Given Section 105 of the 1969 Act by the Court of Appeals, Which Construction Prohibits Administrative Review of the Merits of a Notice of Violation, Contravenes the Due Process Clause of the Fifth Amendment to the United States Constitution.

The Court of Appeals decision that Section 105 of the 1969 Act prohibits review of the merits of a notice of violation permits an inspector to enter a mine, issue a clearly invalid notice of violation (for example, alleging that all of the mining equipment is in violation of the law because it is painted yellow instead of orange) and require that the alleged violation be corrected (that is, that such equipment be painted orange) within a specified time. The mine operator, because he cannot seek review of the validity of the notice in a Section 105 proceeding, is forced either to undertake unnecessary corrective action or to await transformation of the notice into an order requiring him to withdraw all men from the mine, which forces discontinuance of mining operations. Either course of action involves substantial expense, numerous wasted man hours, and loss of coal production vital to the nation; yet one of the alternatives must be elected, despite the obvious invalidity of the notice of violation.

While this example may be carrying the effect of the Court of Appeals decision to its extreme, it is nevertheless entirely possible under its construction of Section 105. Indeed, the merits of this case produce no less absurd a result. In well reasoned opinions, an administrative law judge and the Board held that the Company's centrally located bathhouse does not violate the health and safety standard cited in the notice of violation. Yet, because the Court of Appeals ruled that such decisions improperly considered the merits of the alleged violation, the Company must now comply with

the "invalid" notice of violation by building an unnecessary bathhouse or await transformation of the notice into an order closing its mine for an intentional failure to construct such a bathhouse, with the potential for criminal sanctions.

The due process clause of the Fifth Amendment to the United States Constitution "requires an opportunity for a hearing before a deprivation of property takes effect." *Fuentes* v. *Shevin,* 407 U.S. 67, 88, *rehearing denied,* 409 U.S. 902 (1972). Applying this standard in *Miles* v. *District of Columbia,* 510 F.2d 188, 192 (D.C. Cir. 1975), the Court of Appeals of the District of Columbia held that a building that is alleged to be a menace to public health and safety may not be destroyed before the owner is given "sufficient notice, a hearing and ample opportunity to demolish the building himself or to do what suffices to make it safe or healthy; such a procedure is the essence of the governmental responsibility to accord due process of law." No less protection is due a mine operator issued a notice alleging a violation of a mandatory health or safety standard, especially since such notice is based upon the unreviewed opinion of a sole mine inspector. The Court of Appeals' construction of Section 105, prohibiting review of the merits of such a notice until after abatement of the condition alleged to create a violation or the issuance of a withdrawal order, denies such protection. See *Lucas* v. *Morton, supra.*

Where a statute is ambiguous and permits alternative constructions, sound rules of statutory construction require an interpretation which will avoid a declaration of unconstitutionality. *United States* v. *Rumely,* 345 U.S. 41, 45 (1952). Accordingly, Section 105 must be interpreted to permit review of the merits

of notices of violation. The alternative is a declaration that the statute, insofar as it requires a mine operator to abate a notice of violation or suffer a withdrawal order for failure to abate before becoming entitled to a hearing on the merits of a notice of violation, is unconstitutional.

3. This Case Involves Fundamenal Constitutional Issues and Significant Practical Considerations Bearing Upon the Enforcement of the 1969 and 1977 Acts, Which Issues and Considerations Affect the Entire Coal Industry.

The Court of Appeals' interpretation of Section 105 renders unconstitutional the enforcement scheme of the 1969 Act. Although not specifically addressed in the Court of Appeals' decision, the due process issue must be considered. Unless considered, the Company will be required to correct a violation already determined to be invalid or await transformation of the notice of violation into an order closing the mine for an intentional failure to abate.

The importance of the Court of Appeals' ruling is not limited to this case or to the Company. The Court of Appeals specifically acknowledged the similarity between the review provisions of the 1969 Act and those of the 1977 Act,[4] indicating its decision would be no different if the 1977 Act's review provisions were involved (Appendix A, pp. 2a-3a n.3). Several administrative law judges of the Federal Mine Safety and Health Review Commission have since followed the Court of Appeals' decision and held that the validity of notices of violation issued under Section 104(d) of the 1977 Act [Pub. L. No. 95-164, tit. II,

[4] The pertinent review provisions are reprinted in the "Statutory Provisions Involved" section of this petition, *supra* at 3-5.

§ 201, 91 Stat. 1301, 30 U.S.C.A. § 814(d)] may not be tested in review proceedings under Section 105(d) of the 1977 Act [Pub. L. No. 95-164, tit. II, § 201, 91 Stat. 1305-06, 30 U.S.C.A. § 815(d)]. *Itmann Coal Company* v. *Secretary of Labor, Mine Safety and Health Administration,* Docket No. HOPE 78-356 (May 26, 1978); *Peter White Coal Mining Corp.* v. *Secretary of Labor, Mine Safety and Health Administration,* Docket No. HOPE 78-371, et al. (June 16, 1978); *Monterey Coal Company* v. *Secretary of Labor, Mine Safety and Health Administration,* Docket No. VINC 78-372, et al. (June 19, 1978); *U. S. Steel Corporation* v. *Secretary of Labor, Mine Safety and Health Administration,* Docket No. BARB 78-424 (June 29, 1978).

The Court of Appeals' decision limiting the scope of review under Section 105 of the 1969 Act has been and will continue to be used as a basis for limiting review under its counterpart in the 1977 Act. The enforcement scheme in the 1977 Act is a matter of great importance to the entire industry. Final resolution of the issue by this Court will avoid protracted disputes, facilitate enforcement of the 1977 Act, and permit continuation of the safe and efficient production of coal needed to fulfill the goals of the nation's energy program.

CONCLUSION

This case involves fundamental constitutional issues and significant practical considerations which affect the entire coal industry. The decision of the Court of Appeals conflicts with all reported decisions of this Court and other courts concerning the scope of review

under Section 105 of the 1969 Act. The Court of Appeals' decision construing Section 105 of the 1969 Act contravenes the due process clause of the Fifth Amendment to the United States Constitution.

For the reasons expressed hereinabove, the Company respectfully states that a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia.

Respectfully submitted,

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August 7, 1978

APPENDIX

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1208

UNITED MINE WORKERS OF AMERICA, PETITIONER

v.

CECIL D. ANDRUS, Secretary of the Interior, RESPONDENT

CARBON FUEL CO., INTERVENOR

Petition for Review of an Order of the
Board of Mine Operation Appeals of the
Department of Interior

Argued March 17, 1977

Decided May 9, 1978

Judgment entered this date

Steven B. Jacobson, with whom *Harrison Combs* was on the brief, for petitioner.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Edwin E. Huddleson, III, Attorney, Department of Justice, with whom *Rex E. Lee*, Assistant Attorney General, and *William Kanter*, Attorney, Department of Justice, were on the brief, for respondent.

Charles Q. Gage for intervenor.

Before McGOWAN, ROBINSON and WILKEY, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* ROBINSON.

ROBINSON, *Circuit Judge*: Once again[1] we are confronted by a controversy generated by ambiguity in the Federal Coal Mine Health and Safety Act of 1969.[2] The issue on this occasion is whether a mine operator served with notice of violation of a health standard not posing imminent danger could obtain administrative review of the charge on the merits prior to issuance of an order commanding withdrawal of his miners from the affected area. We answer that question in the negative. Our decision is governed by the terms of the 1969 Act notwithstanding its displacement by new legislation in 1977,[3] and resultantly our opinion speaks largely to the past.

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[1] See, *e.g.*, *Association of Bituminous Contractors, Inc.* v. *Andrus*, No. 75-1931 (D.C. Cir. Feb. 22, 1978); *UMW* v. *Kleppe*, 174 U.S.App.D.C. 328, 532 F.2d 1403, *cert. denied*, 429 U.S. 858, 97 S.Ct. 157, 50 L.Ed.2d 135 (1976); *Phillips* v. *Interim Bd. of Mine Operations Appeals*, 163 U.S.App.D.C. 104, 500 F.2d 772, (1974), *cert. denied*, 420 U.S. 938, 95 S.Ct. 1149, 43 L.Ed.2d 415 (1975); *National Independent Coal Operators Ass'n* v. *Morton*, 161 U.S.App.D.C. 68, 494 F.2d 987 (1974), *aff'd*, 423 U.S. 388, 96 S.Ct. 809, 46 L.Ed.2d 580 (1976).

[2] Pub. L. No. 91-1073, 83 Stat. 742, 30 U.S.C. §§ 801 *et seq.* (1970).

[3] Late last year Congress passed the Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290, which supersedes both the Federal Coal Mine Health and Safety Act of 1969 and the Federal Metal and

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Nonmetallic Mine Safety Act of 1966, Pub. L. No. 89-577, 80 Stat. 772. By then this case had already been submitted to us for decision, and only less than a month ago did the new legislation become effective. Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, tit. III, § 307, 91 Stat. 1322. None of the parties contend, nor does anything uncovered by our independent research suggest, that Congress intended any application whatsoever of the 1977 Act to administrative proceedings long since concluded under its 1969 predecessor, as is the situation here. See *id.* § 301(c). Compare *Swinton* v. *J. Frank Kelly, Inc.*, 180 U.S.App.D.C. 216, 218-219, 554 F.2d 1075, 1077-1078, *cert. denied*, 429 U.S. 820, 97 S.Ct. 67, 50 L.Ed.2d 81 (1976) with *de Rodulfa* v. *United States*, 149 U.S.App.D.C. 154, 161, 164-167, 461 F.2d 1240, 1247, 1250-1253, *cert. denied*, 409 U.S. 949, 93 S.Ct. 270, 34 L.Ed. 2d 220 (1972). See also *United States* v. *St. Louis, S. F. & T. Ry.*, 270 U.S. 1, 3, 46 S.Ct. 182, 183, 70 L.Ed. 435, 437 (1926); *United States Fidelity & Guar. Co.* v. *United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 315-317, 28 S.Ct. 537, 540, 52 L.Ed. 804, 807-808 (1908). And although we have no call to construe the 1977 Act itself, our investigation uncovered nothing in its language or legislative history that modifies our view of how Congress contemplated that the 1969 Act would operate on the matter here in issue. On the contrary, enforcement proceedings under the new Act generally are "patterned on the current Coal Act," S. Rep. No. 181, 95th Cong., 1st Sess. 12 (1977), [1977] U.S. Code Cong. & Ad. News 5193, 5204, notwithstanding that the 1977 counterparts of the relevant provisions of the 1969 Act are cast in substantially modified language. See Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, tit. II, § 201, 91 Stat. 1300, 1305-1306 (amending Federal Coal Mine Health and Safety Act of 1969, §§ 104(a), (b) & 105(d)).

Since the Secretary of the Interior, originally the respondent herein, had delegated his adjudicative responsibilities under the 1969 Act to the Board of Mine Operations Appeals, 43 C.F.R. § 4.500(a) (1976), the decision of the Board is properly the subject of this review. The 1977 Act, however, transferred administrative review to the Federal Mine Safety and Health Review Commission, see Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, tit. II, § 201, 91 Stat. 1305-1306 (amending Federal Coal Mine Health and Safety Act of 1969, § 105(d), 30 U.S.C. § 815(d) (1970));

I

Pursuant to the 1969 Act,[4] the Secretary of the Interior promulgated mandatory health and safety standards designed for the protection of coal miners.[5] To ensure compliance with those standards, the Mining Enforcement and Safety Administration (MESA), the authorized representative of the Secretary, made frequent inspections of mines.[6] If a MESA inspector determined that there was imminent danger from a breach of the standards, he issued a withdrawal order requiring removal of all miners from the imperiled area until the hazard disappeared.[7] If, on the other hand, the inspector found disobedience of a standard but no immediate threat to health or safety therefrom, he issued a violation notice fixing a reasonable time for its abatement.[8] That period

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id. tit. III, § 301(c)(1)-(2), 91 Stat. 1318. The Secretary of the Interior remains as respondent because the new law provides that it "shall not affect suits commenced prior to [its effective date] and in all such suits proceedings shall be had, appeals taken, and judgments rendered, in the same manner and effect as if this section had not been enacted. . . ." *Id.* tit. III, § 390(c)(4), 91 Stat. 1319. The only exception is for suits involving investigative functions transferred to the Secretary of Labor, in which case that Secretary is to be substituted as a party. *Id.* Our suit, however, involves administrative review functions transferred to the Federal Mine Safety and Health Review Commission, *supra*, and we accordingly deny the joint motion of the Secretary of the Interior and the Secretary of Labor to add the Secretary of Labor as a respondent. See also note 58 *infra*.

[4] Federal Coal Mine Health and Safety Act of 1969, § 101, 30 U.S.C. § 811 (1970).

[5] 30 C.F.R. §§ 70.100 *et seq.* (1976).

[6] Federal Coal Mine Health and Safety Act of 1969, § 103, 30 U.S.C. § 813 (1970).

[7] *Id.* § 104(a), 30 U.S.C. § 814(a) (1970).

[8] *Id.* § 104(b), 30 U.S.C. § 814(b) (1970).

could be extended, but if it was not and if the violation persisted, a withdrawal order then followed.[9] Such an order could also emit, even without allowance for an abatement period, when there was an "unwarrantable" but not imminently hazardous failure to comply with the standards.[10]

A mine operator aggrieved by either a notice or an order could apply for administrative review.[11] Any necessary investigation was made, an opportunity for a hearing was provided,[12] and review of the administrative decision was available in the courts of appeals.[13] The Act specified civil penalties for noncompliance with its provisions or with health or safety standards formulated thereunder,[14] as to which the operator had the right to a trial de novo in a district court.[15] In the instance of a withdrawal order, the operator could obtain both administrative and judicial review of an inspector's conclusion that an imminently dangerous con-

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[9] *Id.*

[10] *Id.* § 104(c), 30 U.S.C. § 814(c) (1970). The withdrawal order could issue only after the operator had been given two violation notices within a 90-day period and a finding had been made for each violation that it was caused by unwarrantable failure to comply with the Act.

[11] *Id.* § 105(a), 30 U.S.C. § 815(a) (1970), quoted in text at note 27 *infra*.

[12] *Id.*

[13] *Id.* § 106(a), 30 U.S.C. § 816(a) (1970).

[14] *Id.* § 109, 30 U.S.C. § 819 (1970).

[15] *Id.* § 109(a)(4), 30 U.S.C. § 813(a)(4) (1970). The new Act may not be so generous. See S. Rep. No. 181, *supra* note 3, at 46, [1977] U.S. Code Cong. & Ad. News at 5237. Under the 1969 Act, issues of fact that were or could have been litigated earlier in review proceedings before a court of appeals were not determinable de novo in the district court.

dition existed.[16] The pivotal question on this appeal is whether the operator could also litigate the facts prompting a notice of violation or only the question of the reasonableness of the time allowed for its abatement.

II

Carbon Fuel Company, the intervenor here, operates several short-lived mines in the Appalachian region of West Virginia, including one known as No. 6A, 23 Drift Mine.[17] That facility is three miles distant from Carbon's central bathhouse, which serves a total of six mines in the area.[18] After complaints by miners that, in contravention of the Secretary's regulations, the bathhouse was inconveniently located, a MESA official investigated and issued a notice of violation giving Carbon 30 days to abate.[19] Carbon resorted to administrative review, claiming that the time allotted for abatement was unreasonable and "that any period of time set for the abatement of such invalid Notice would be unreasonable." [20]

An administrative law judge ruled that he had jurisdiction not only to extend the abatement period but also to vacate the violation notice on the merits, because, in his words, " 'any time for abatement is an unreasonable time if no violation exists.' " [21] He then rejected MESA's

[16] Federal Coal Mine Health and Safety Act of 1969, §§ 105(a), 106, 30 U.S.C. §§ 815(a), 816 (1970).

[17] *Carbon Fuel Co.*, No. HOPE 75-800 (administrative law judge July 22, 1975), at 4, Joint Appendix (J. App.) 229.

[18] *Id.*

[19] *Id.* at 4-5, J. App. 229-230.

[20] Application for Review and Motion to Expedite Hearing and Decision at 2, J. App. 6.

[21] *Carbon Fuel Co., supra* note 17, at 7, J. App. 232, quoting *Freeman Coal Mining Corp.*, 1 I.B.M.A. 1, 27 (1970).

contention that the bathhouse was not conveniently situated for use by those working in No. 6A, 23 Drift Mine.[22] The Board of Mine Operations Appeals affirmed the initial determination on location without any reference to the question of its jurisdiction to dissolve the notice, as opposed to authority merely to pass upon the reasonsonableness of the time allowed for correction of the alleged violation.[23] Petitioner, United Mine Workers of America, then came to this court for further review, attacking both jurisdiction and the decision on the merits.[24]

III

The Federal Coal Mine Health and Safety Act of 1969 set forth in Section 105 the specifications governing administrative review of withdrawal orders and notices of violations.[25] Those provisions drew some rather large distinctions in scope between the two. The Secretary was empowered to grant temporary relief from a withdrawal order but not from the consequences of disobeying a violation notice.[26] In relevant part Section 105(a)(1) also provided:

> An operator issued an order . . . or any representative of miners in any mine affected by such order or by any modification or termination of such order, may apply to the Secretary for review of the order. . . . An operator issued a notice . . . or any repre-

[22] *Id.* at 7-10, J. App. 232-235.

[23] *Carbon Fuel Co.*, 6 I.B.M.A. 20 (1976).

[24] Because of our disposition of the jurisdictional issue, we do not reach petitioner's contention concerning the existence of a violation.

[25] Federal Coal Mine Health and Safety Act of 1969, § 105, 30 U.S.C. § 815 (1970).

[26] *Id.*

> sentative of miners in any mine affected by such notice, may, *if he believes that the period of time fixed in such notice for abatement of the violation is unreasonable, apply to the Secretary for review* of the notice. . . . [A]n opportunity for a public hearing [shall be provided] at the request of the operator or the representative of miners in such mine, to enable the operator and the representative of miners in such mine to present information relating to the issuance and continuance of such order or the modification or termination thereof *or to the time fixed in such notice.*[27]

If this were the sole statutory directive concerning administrative review of orders and notices, we would be inclined—simply on the basis of the plain language of this section—to accept petitioner's contention that the only permissible challenge to a notice was one calling into question the reasonableness of the time for abatement. Section 105(a)(1) clearly differentiated withdrawal orders and violation notices: one affected by an order in any way could seek "review of the order," [28] while one aggrieved by a violation notice could apply for review only "if he believe[d] that the period of time fixed in the notice for abatement of the violation [was] unreasonable." [29] And while in the case of an order a litigant could "present information relating to the issuance and continuance of such order or the modification or termination thereof," [30] in the instance of a notice his offering was limited "to the time fixed in such notice." [31]

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[27] *Id.* § 105(a)(1), 30 U.S.C. § 815(a)(1) (1970).

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

Section 105, however, continued in subsection (b) in a somewhat ambiguous fashion:

> Upon receiving the report of . . . investigation, the Secretary shall make findings of fact, and he shall issue a written decision, incorporating therein an order vacating, affirming, modifying, or terminating the order, or the modification or termination of such order, or the notice, complained of and incorporate his findings therein.[32]

That, considered alone, was susceptible to a reading empowering the Secretary to "terminat[e]" a "notice," an event which could logically occur only if the notice were reviewed on the merits. Statutory provisions are to be construed, however, not in isolation but together with other related provisions.[33] So treated, Section 105(b) could much more readily be interpreted as authorizing only such relief from orders and notices as was consistent with the highly specific directions in Section 105(a)(1) as to the issues respectively raisable upon challenges to the one or the other.

IV

Since perhaps we cannot with complete safety rest the statutory limits of administrative review upon the statutory text alone, we turn to the legislative history for guidance to the congressional intent,[34] and find that

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[32] *Id.* § 105(b), 30 U.S.C. § 815(b) (1970).

[33] See *Philbrook* v. *Glodgett*, 421 U.S. 707, 713, 95 S.Ct. 1893, 1898, 44 L.Ed.2d 525, 532-533 (1975), citing *United States* v. *Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122, 12 L.Ed. 1009, 1013 (1849); *Kokoszka* v. *Belford*, 417 U.S. 642, 650, 95 S.Ct. 2431, 2436, 41 L.Ed.2d 374, 381 (1974), citing *Brown* v. *Duchesne*, 60 U.S. (19 How.) 183, 194, 15 L.Ed. 595, 599 (1857).

[34] See, *e.g.*, *First Nat'l Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 261, 87 S.Ct. 492, 497, 17 L.Ed.2d 343, 349

the history is fortunately unambiguous. The precursor of the 1969 statute, the Federal Coal Mine Safety Act of 1952,[35] while providing for administrative and judicial review of withdrawal orders, furnished no vehicle whatsoever for review of violation notices.[36] Similarly, in the legislative process leading to the 1969 Act, neither the bill initially passed by the House[37] nor that first approved by the Senate authorized review of notices of violation.[38] When, however, those bills—which in other respects differed—left the hands of conferees on behalf of the two chambers, the text of the review provisions of Section 105 emerged.[39] And the Conference Report delineates the scope of jurisdiction afforded by the 1969 review mechanism: it "provide[d] in Section 105(a) for review *solely* of the reasonableness of the time fixed in [the] notice."[40] The legislative history thus evidences plainly enough a congressional purpose to open up to

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(1966); *United Shoe Workers* v. *Bedell*, 165 U.S.App. D.C. 113, 118, 506 F.2d 174, 179 (1974); *Portland Cement Ass'n* v. *Ruckelshaus*, 158 U.S.App.D.C. 308, 316, 486 F.2d 375, 383, *cert. denied*, 417 U.S. 921, 94 S.Ct. 2628, 41 L.Ed.2d 226 (1973); *National Petroleum Refiners Ass'n* v. *FTC*, 157 U.S.App.D.C. 83, 100, 482 F.2d 672, 689, *cert. denied*, 415 U.S. 951, 94 S.Ct. 1475, 39 L.Ed.2d 567 (1973).

[35] Act of July 16, 1952, ch. 877, 66 Stat. 692.

[36] *Id.*, 66 Stat. 699-702.

[37] S. 2917, reprinted in Senate Comm. on Labor and Public Welfare, 94th Cong., 1st Sess., Legislative History of the Federal Coal Mine and Safety Act of 1969, at 1402-1438 (Comm. Print 1975) (hereinafter cited as "Legislative History").

[38] S. 2917, Legislative History 782-912.

[39] S. 2917, Legislative History 1445-1506.

[40] H.R. Rep. No. 91-761, 90th Cong., 2d Sess. 69 (1969), Legislative History 1513 (statement of House managers) (emphasis supplied).

review only a single narrow question regarding violation notices.

If any further indicium of that intent were necessary, it would be found in the section-by-section analysis of the Conference bill, which Senator Williams—one of the sponsors of the Senate bill and a Conference Committee manager—introduced into the Congressional Record during the post-conference Senate debates. Addressing Section 105, the analysis states:

> Subsections (a), (b), and (c) establish a procedure for reviewing administratively withdrawal orders issued by an inspector, modifications or terminations of such orders by an inspector, and *the reasonableness of the time limits in notices*. . . .[41]

This passage not only confirms our understanding of the Conference Report's use of the word "solely,"[42] but like its progenitors it makes no reference to the possibility that a notice could be vacated or otherwise terminated on the merits.

Against this array of historical data, the Secretary can point merely to an administrative interpretation by the Board of Mine Operations Appeals to the effect that the notice-review provisions authorize some measure of consideration of violation notices on the merits. Several years ago, in *Freeman Coal Mining Corporation*,[43] the Board, without any discernible analysis of the problem, said:

> We accept, at least for purposes of the issues presently before us, the proposition that any time

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[41] Legislative History 1603 (emphasis supplied).

[42] See text *supra* at note 40.

[43] *Supra* note 21.

for abatement is an unreasonable time if no violation exists.[44]

While the Secretary correctly notes that courts normally accord great weight to administrative construction of the statute administered,[45] such interpretations forfeit their entitlement to deference when they plainly conflict "with other indicia of the proper interpretation of" the statute.[46] As we have seen, the words of Section 105 (a),[47] viewed in the strong light of the straightforward legislative history,[48] argue irresistibly the other way.

Moreover, were we to read the review provisions as the Secretary urges, we would effectively obliterate the distinction which Section 105(a)(1) plainly made between administrative review of withdrawal orders and of violation notices.[49] It would have made no sense at

[44] *Freeman Coal Mining Corp., supra* note 21, 1 I.B.M.A. at 27. That proposition was accepted "for purposes of the issues presently before" the Board. *Id.* The Board reasoned only that "the Act itself nowhere expressly precludes review of the fact of violation," *id.* at 28, yet the proper question is not how much jurisdiction was precluded but how much was conferred.

[45] See, *e.g., Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434, 91 S.Ct. 849, 854-855, 28 L.Ed.2d 158, 165 (1971); *United States* v. *City of Chicago*, 400 U.S. 8, 10, 91 S.Ct. 18, 20, 27 L.Ed.2d 9, 12-13 (1970); *Udall* v. *Tallman*, 380 U.S. 1, 4, 85 S.Ct. 792, 795, 13 L.Ed.2d 616, 619 (1965).

[46] *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 143, 97 S.Ct. 401, 411-412, 50 L.Ed.2d 343, 358 (1976); accord, *Laborers' Local 1057* v. *NLRB*, —— U.S.App.D.C. ——, ——, 567 F.2d 1006, 1015 (1977) ("[w]hile we respect an administrative agency's interpretation of a statute that it is entrusted with enforcing, in the end the paramount deference must be extended to Congress itself") (footnote omitted).

[47] See text at notes 25-27 *supra*.

[48] See text at notes 34-42 *supra*.

[49] See text at notes 27-31 *supra*.

all for Congress to have separately and differently articulated the scope of review of orders and notices if they were to be precisely the same. Particularly against the backdrop of the legislative history, we cannot assume that Congress intended its distinction to have no meaning.[50]

V

To be sure, the interpretation we ascribe to Section 105(a) could have worked some hardship on a mine operator who received a notice of violation but believed that he was in full conformity with the Act. He then would have been compelled either to abate the condition or to await transformation of the notice to a withdrawal

[50] See *American Horse Protection Ass'n* v. *Department of Interior*, 179 U.S.App.D.C. 246, 253, 551 F.2d 433, 440 (1977).

The Secretary also contends that the Supreme Court in *National Independent Coal Operators Ass'n* v. *Kleppe, supra* note 1, ruled that an operator could obtain administrative review on the merits of a violation notice. All the Supreme Court said was that "[u]nder § 105, 30 U.S.C. 815, an operator may apply to the Secretary for review of the factual basis of any order or notice issued under § 104, or for review of the amount of time allowed for abatement of violations." 423 U.S. at 391, 96 S.Ct. at 811, 46 L.Ed.2d at 584. The Court in that case was not specifically considering the breadth of review allowed. We are unwilling to assume that this casual description was intended as a definitive interpretation of the scope of permissible review.

The Secretary also points to two decisions, *Lucas* v. *Morton*, 358 F.Supp. 900 (W.D. Pa. 1973) (3-judge court), and *Lucas Coal Co.* v. *Interior Bd. of Mine Operation Appeals*, 522 F.2d 581 (3d Cir. 1975), and argues that they conflict with the conclusion we reach. To the extent that those courts differ in their interpretation of the review provisions, we must respectfully disagree. See also *Kanawha Coal Co.* v. *Andrus*, 553 F.2d 361, 363 (4th Cir. 1977) (noting, without criticism, "the position of the Secretary that" administrative review extends to "whether a violation existed . . . and whether the time for abatement fixed by that notice was reasonable").

order by a failure to abate, at which point he would have finally been entitled to challenge the existence of the violation.[51] On the other hand, a contrary construction would simply have transferred the hardship to the miners, and with a much more emphatic impact. Since a withdrawal order automatically removed miners from the area of the alleged health and safety violation, even prolonged review at that time of the order on the merits did not leave them at peril. When, however, only a notice had issued, review of the fact of violation would have subjected the miners to continuing their labors—perhaps for a substantial period—under conditions which, though not thought to be imminently dangerous,[52] were nonetheless believed to be unwholesome and in contravention of the Act's health and safety standards.[53]

In any event, the decision where the hardship should fall was one for Congress to make,[54] and, unconstitutionality aside,[55] neither we nor the Secretary has the prerogative to alter it. Congress made its choice clear when, in staking out goals for the 1969 Act, it solemnly declared that "[t]he first priority and concern of all in the coal mining industry must be the health and

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[51] See Federal Coal Mine Health and Safety Act of 1969, § 105(a), 30 U.S.C. § 815(a) (1970).

[52] See *id.* § 104(b), 30 U.S.C. § 814(b) (1970).

[53] See also S. Rep. No. 181, *supra* note 3, at 30, [1977] U.S. Code Cong. & Ad. News at 5222 ("[t]he Committee believes that rapid abatement of violations is essential for the protection of miners").

[54] See, *e.g.*, *Barnes* v. *Costle*, —— U.S.App.D.C. ——, —— n.81, 561 F.2d 983, 994 n.81 (1977).

[55] Because no issue has been raised concerning the constitutionality of the statutory scheme, we do not pass on it here. But see *Lucas* v. *Morton*, *supra* note 50.

safety of its most precious resource—the miner. . . ." [56] That priority was reflected in the Act's review provisions, which did not tolerate either temporary relief from notices of violation [57] or, as we now hold, review on the merits of the violation charged while miners continued to work in the affected area. Only when the miners had been removed, or after the violation had been abated and civil-penalty proceedings instituted, did the operator become entitled to challenge the existence of conditions allegedly trespassing upon the Act. That, we think, was Congress' decree, and we must respect it.

The order of the Board of Mine Operations Appeals is reversed and the case is remanded [58] for further proceedings consistent with this opinion.

Reversed and remanded.

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[56] Federal Coal Mine Health and Safety Act of 1969, § 1, 30 U.S.C. § 801(a) (1970). See also *UMW* v. *Kleppe*, *supra* note 1, 174 U.S.App.D.C. at 330-331, 532 F.2d at 1405-1406.

[57] See note 26 *supra* and accompanying text.

[58] As we noted earlier, note 3 *supra*, the Board of Mine Operations Appeals no longer exists and the Secretary of the Interior no longer is responsible for administrative review in this field, but pursuant to the new law we retained the Secretary as respondent. Although we are thus technically remanding to the Secretary, under the 1977 Act further proceedings to comply with this opinion will automatically take place before the Federal Mine Safety and Health Review Commission. See Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, tit. III, § 301(c)(3), 91 Stat. 1318.

APPENDIX B

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF MINE OPERATIONS APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

CARBON FUEL COMPANY

IBMA 76-24 Decided February 20, 1976

Appeal by the Mining Enforcement and Safety Administration and the United Mine Workers of America from a decision by Administrative Law Judge Forrest E. Stewart, dated July 22, 1975, granting an Application for Review (Docket No. HOPE 75-800) and dismissing a Petition for Modification (Docket No. M 75-131) under the Federal Coal Mine Health and Safety Act of 1969.

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Mandatory Health Standards: Bathhouse and Change-room Facilities

A violation of 30 CFR 75.1712-2, requiring that bathing and change-room facilities be provided in a central location convenient to all the miners where such facilities serve the miners of more than one mine, is not proved when the evidence shows that the average distance from the six mines served is 2.1 miles and the portal of the mine farthest from such facilities is only 1.1 miles farther than the portal of the nearest mine.

APPEARANCES: Thomas A. Mascolino, *Assistant Solicitor*, Robert A. Cohen, *Trial Attorney*, for appellant Mining Enforcement and Safety Administration; Steven B. Jacobson, Esq., H. John Taylor, Esq., for appellant United Mine Workers of America; Charles Q. Gage, Esq., for appellee Carbon Fuel Company.

OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE

Background

On May 22, 1975, a federal coal mine inspector issued Notice No. 3 SAD at Carbon Fuel Company's (Carbon) No. 6A, 23 Drift Mine at Winifrede, West Virginia. The notice, issued pursuant to section 104(b) of the Federal Coal Mine Health and Safety Act of 1969 (Act),[1] cited the following condition.

> The bathing facilities and change rooms provided for the use of the miners at this mine, was not conveniently located in that the mine is located a distance of 4 miles from the present facilities.

The parties subsequently agreed that the 4-mile figure in the notice was in error and that the correct distance between the bathhouse and the 6A, 23 portal is actually 3 miles.[2] The standard alleged to be violated, 30 CFR 75.1712-2, provides:

> Bathhouses, change rooms, and sanitary toilet facilities shall be in a location convenient for the use of the miners. Where such facilities are designed to serve more than one mine, they shall be centrally located so as to be as convenient for the use of the miners in all the mines served by such facilities.

On June 2, 1975, Carbon filed an Application for Review of the above notice and a motion for expedited hearing. It contended that the time set for abatement (1 month) was unreasonable, alleged that the bathhouse facilities serving

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[1] 30 U.S.C. §§ 801-960 (1970).

[2] Tr. 10, Applicant Exh. 1.

its 6A, 23 Drift Mine were centrally located, and that the notice was therefore invalid. Carbon also filed a motion for extension of time for abatement and a Petition for Modification of 30 CFR 75.1712-2.[3]

On June 9 and 10, 1975, an expedited hearing was held in Charleston, West Virginia. The following evidence was adduced at the hearing. Carbon's 6A, 23 Drift Mine was first opened in April 1974. It employs 41 men on two production shifts and produces approximately 300 tons of coal in a 24-hour period. The estimated life of the mine is 7 years. The 6A, 23 Drift Mine is one of six mines in Carbon's Winifrede Division. All six of the mines are served by the single bathhouse cited in the notice of violation. The table below lists the distance in miles from each mine to the bathhouse:[4]

6A, 23 Drift	3.0
Morton Mine	1.9
45 Mine	2.2
31 Mine	2.1
31-2 Drift	2.2
No. 38 (Strip)	2.2

The road from the bathhouse to the portal of the 6A, 23 Drift Mine consists of 1 mile of hard surface and 2 miles of dirt road. All but about six of the miners pass the bathhouse on their way to and from work.[5]

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[3] The Petition for Modification was published in the *Federal Register* on June 17, 1975. It averred that the existing bathhouse facilities serving the 6A, 23 Drift Mine would at all times guarantee no less than the same amount of protection afforded the miners of this mine by the application of the above standard. It included a list of improvements contemplated for the existing facility if the Petition were granted.

[4] Applicant Exh. 1.

[5] Government Exh. 2.

Mining Enforcement and Safety Administration (MESA) Inspector Sonny A. Davenport, who issued the above notice, testified that he used his own judgment in making the determination that the bathhouse was not convenient for the miners at the 6A, 23 Drift Mine. He defined as "convenient" a situation where men could come out of a mine, take a shower, and change clothes without having to get into their cars and drive 3 miles (Tr. 129).

Mr. George M. Pritt, MESA Coal Mine Inspection Supervisor, who directed the inspector to issue the instant notice, testified that MESA had established no official policy or guidelines for interpreting the terms "convenient" and "centrally located" in 30 CFR 75.1712-2 (Tr. 23). He stated that the bathhouse was inconvenient with respect to the 6A, 23 Drift Mine to the extent that a man emerging from the mine "would be subject to at times being wet, hot, dirty, tired—he'd have in the winter time a cold automobile to enter and drive 15 minutes before he can arrive at a place to find the facilities for washing, cleaning up, and put on dry, clean clothes" (Tr. 22). According to Mr. Pritt, a centrally locally bathhouse would be one which was equidistant from all the mines it served. He felt that the bathhouse in the instant case was "reasonably convenient" (Tr. 58-59) for those mines within a 2-mile radius. On this basis, he found the bathhouse inconvenient for the miners at the 6A, 23 Drift Mine.

The Judge in his decision observed that Mr. Pritt's definition of "convenient" (a bathhouse located within 2 miles of a mine portal) conflicted with the inspector's definition (a bathhouse within walking distance of a mine portal). In view of the fact that MESA had no official guidelines for applying the terms of this regulation, he noted that the inspector's interpretation of convenient was vague and arbitrarily applied in an area where none of the mine portals was near enough to each other so that a centrally located bathhouse would be within walking distance. The

Judge also considered the fact that most of the miners passed the bathhouse on their way to and from work as having a bearing on convenience and concluded that MESA had failed to make out a prima facie case of the alleged violation. He therefore granted the Application for Review, vacated the Notice of Violation and dismissed without prejudice the Petition for Modification.

Contentions of the Parties

MESA contends that the inspector's interpretation of the term "convenient" was reasonable and that the Judge erred in rejecting it.

The UMWA contends that the Judge misinterpreted the term "convenient" and that MESA correctly "drew a line" between mine portals located 2 and those located 3 miles from the bathhouse.

Carbon contends that the decision of the Judge is supported by a preponderance of the evidence and should be affirmed.

Issue

Whether the Judge erred in concluding that MESA had failed to prove a violation of 30 CFR 75.1712-2.

Discussion

For the following reasons we think that the Judge correctly vacated the notice of violation. The subject regulation does not require either that a bathhouse be located at each mine portal or that a bathhouse be located within walking distance where such facility serves more than one mine. Indeed, the regulation is silent on limitations in terms of distance. It requires a bathhouse that serves more than one mine to be centrally located for the convenience of all the miners. In the present record the only fact of consequence which differentiates the 6A, 23 portal from the other portals in the Winifrede division is that the 6A,

23 portal is 8/10 of a mile farther from the bathhouse than the next closest portal. We cannot conclude that this increment in distance renders the 6A, 23 portal inconvenient with respect to the location of the bathhouse, especially when it is considered that most of the miners employed at the subject mine pass the bathhouse on their way home. We hold that under the facts of the present case the requirements of comfort and convenience prescribed by the regulation were met, and that the interpretations urged by MESA and the UMWA exceed those requirements.

Accordingly, the Judge's decision should be affirmed.

Order

WHEREFORE, pursuant to the authority delegated to the Board of Mine Operations Appeals by the Secretary of the Interior, (43 CFR 4.1(4)), the decision in the above-captioned proceeding IS AFFIRMED.

/s/ DAVID DOANE
David Doane
Chief Administrative Judge

I concur:

/s/ HOWARD J. SCHELLENBERG, JR.
Howard J. Schellenberg, Jr.
Administrative Judge

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APPENDIX C

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS
HEARINGS DIVISION
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

July 22, 1975

CARBON FUEL COMPANY, *Petitioner*

v.

MINING ENFORCEMENT AND SAFETY ADMINISTRATION (MESA), *Respondent*

UNITED MINE WORKERS OF AMERICA, *Respondent*

Application for Review

Docket No. HOPE 75-800

Notice of Violation No. 3 SAD
May 22, 1975

Petition for Modification

Docket No. M 75-131

Mine No. 6 A, 23 Drift

Decision

Appearances: Charles Q. Gage, Esq., Jackson, Kelly, Holt, & O'Farrell, Charleston, West Virginia, for Petitioner; Robert A. Cohen, Esq., Office of the Solicitor, Department of the Interior, for Respondent (MESA); H. John Taylor, Esq., United Mine Workers of America, Charleston, West Virginia, for Respondent (UMWA).

Before: Administrative Law Judge Stewart.

FACTUAL AND PROCEDURAL BACKGROUND

The above-captioned proceedings were filed in accordance with sections 105 and 301(c)[1] respectively of the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. § 801 *et seq.*).

On June 2, 1975, Petitioner filed the Application for Review and a Motion to Expedite Hearing.

On June 2, 1975, Petitioner concurrently filed the Petition for Modification of a Mandatory Standard and a Motion for Extension of Time for Abatement.

By Notice issued June 3, 1975, the Application for Review was scheduled for expedited hearing on June 9, 1975, in Charleston, West Virginia.

The Mining Enforcement and Safety Administration filed on June 4, 1975, a Motion to Consolidate the above-captioned proceedings.

---

[1] Section 105(a)(1) of the Act provides in pertinent part as follows:

An operator issued an order pursuant to the provisions of section 104 of this title, or any representative of miners in any mine affected by such order or by any modification or termination of such order, may apply to the Secretary for review of the order within thirty days of receipt thereof or within thirty days of its modification or termination. An operator issued a notice pursuant to section 104(b) or (i) of this title, or any representative of miners in any mine affected by such notice, may, if he believes that the period of time fixed in such notice for the abatement of the violation is unreasonable, apply to the Secretary for review of the notice within thirty days of the receipt thereof. • • •.

Section 301(c) provides in pertinent part:

Upon petition by the operator or the representative of miners, the Secretary may modify the application of any mandatory safety standard to a mine if the Secretary determines that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or that the application of such standard to such mine will result in a diminution of safety to the miners in such mine.

On June 9, 1975, the United Mine Workers of America filed an answer to the Application for Review in which it admitted the issuance of the Notice of Violation but denied all other allegations contained in Petitioner's Application. The UMWA concurrently, on June 9, 1975, filed an answer to the Petition for Modification.

An expedited hearing was commenced in Charleston, West Virginia on June 9, 1975. Witnesses were called on June 9 and 10, 1975, by MESA, the Carbon Fuel Company and the UMWA.

On June 11, 1975, MESA filed an answer to the Application for Review wherein it stated that "said Notice was properly issued pursuant to the provisions of Section 104(b) of [the Act] and that the time fixed in said Notice for the Abatement of the violation is reasonable. MESA further denies all other allegations contained in the subject Application for Review. WHEREFORE, the Mining Enforcement and Safety Administration prays that the Application filed herein be dismissed."

The Petition for Modification was published in the *Federal Register* on June 17, 1975, 40 Fed. Reg. 25609.

On June 19, 1975, MESA filed a Motion to Dismiss the Petition for Modification on the ground that the standard, 30 CFR 75.1712-2, is not subject to modification in a Section 301(c) proceeding since it is a mandatory health standard, *citing Cimmaron Coal Company*, Docket No. M 74-27, decided January 14, 1974.

By Notice issued June 23, 1975, the above-captioned proceedings were scheduled for a prehearing conference on June 25, 1975, in Charleston, West Virginia. All parties were represented at the prehearing conference where it was agreed that the proceeding involving the Petition for Modification of a Mandatory Standard would be postponed and the Application for Review expedited. The time limits for filing briefs and proposed findings and conclusions were set

and these documents were filed by Carbon Fuel Co. and MESA on July 8 and 9, 1975, respectively. At the prehearing conference the parties advised that the period for abatement had been extended to July 25, 1975.

Section 30 CFR § 75.1712-2 provides:

> Bathhouses, change rooms and sanitary toilet facilities shall be in a location convenient for the use of the miners. Where such facilities are designed to serve more than one mine, they shall be centrally located so as to be as convenient for the use of the miners in all mines served by such facilities.

II. Issue

Whether Petitioner's bathhouse facility for Mine No. 6A, 23 Drift, located near Winifrede, West Virginia, is centrally located so as to be convenient for the use of the miners at the mine within the meaning of 30 CFR 75.1712-2?

III. Findings and Conclusions

Carbon Fuel Company is the operator of several mines in the area of Winifrede, Kanawha County, West Virginia. The mining in this area is similar to mining in other areas of the Appalachian Region in that the terrain in this region consists of ridges and valleys with splits in the coal seams caused by the valley cutting through the seams (Tr. 179). The terrain in this region results in the opening of a number of mines with a short life to mine "islands of coal" (Tr. 163). This is true with respect to Carbon's operations in the Winifrede area and is also true for other operators in the region.

Carbon operates several mines and other facilities in the Winifrede area, including Mine No. 6; Mine No. 6A, 23 Drift; Mine No. 31 and No. 31—2 Drift; the Morton (No. 34) Mine; No. 38 (Strip) Mine; and Mine No. 45. Other facilities include a shop, supply house and cleaning plants (Carbon Ex. 1).

The 6A, 23 Drift Mine was first opened in April 1974, as part of the No. 6 Mine. It has held the separate designation of No. 6A, 23 Drift since April, 1975. The mine employs 41 men on two production shifts and produces approximately 300 tons of coal in a 24 hour period (Tr. 9). The nearest bathhouse facility to the portal of No. 6A Mine is located three miles away on Winifrede Road (Tr. 10). The road from the bathhouse of the 6A portal consists of one mile of hardtop surface road and two miles of dirt road (Tr. 11).

According to MESA's witness, George Martin Pritt, a Federal Coal Mine Inspection Supervisor, the question of whether the bathhouse facilities were centrally located or convenient for the miners' use was never raised in connection with the portal now known as the No. 6A Mine, 23 Drift from the time that the mine was opened in April, 1974 until February, 1975 (Tr. 51). The question arose, according to UMWA's witness Fitchue L. Philyaw, Regional Safety Coordinator for the UMWA, in late January or early February when he responded to a complaint from some of the miners on the third shift who had found the bathhouse facilities dirty when they arrived, the dirt and mud having been left by the day shift workers who had departed earlier (Tr. 113). When Mr. Philyaw, UMWA, arrived to personally investigate the complaints, he learned that the miners were not working on that particular day (Tr. 113). Mr. Philyaw testified that, in answer to his question put to some miners standing outside the bathhouse whether the allegedly dirty conditions were responsible for the miners not being worked, some of them said, "No. The main thing it is the road is so bad we can't get to the mine" (Tr. 114). Mr. Philyaw further testified that "[s]ome of them [said], 'if we had a bathhouse and you would get off your fanny and start enforcing the law like you should we could stop a lot of this.' I [Philyaw] said, 'What do you want?' They responded 'We want a bathhouse' " (Tr. 114). Thereafter Mr. Philyaw filed an official complaint (Gov't Exhibit #1) wherein it was stated that

"the present bath house . . . is not centrally located" and that a bath house . . . at each individual mine . . . would be *much more convenient* (emphasis added) for the men." Mr. Philyaw testified that two or three days thereafter the president of the local union, Mr. Lester Kincaid, had called him and had asked about the procedure required to "work out some kind of deal up here," interpreted by Mr. Philyaw to mean a withdrawal of the complaint (Tr. 114). Thereafter Mr. Kincaid again called Mr. Philyaw and said, "We've changed our minds. We want a bathhouse" (Tr. 115). In response to the complaint, Inspection Supervisor George M. Pritt, between February 19 and 24, 1975, made an investigation of the location of the bathhouse facilities at the applicant's Winifrede Mine complex. Inspector Pritt, visited the bathhouse facilities and portals in question, spoke to both the company officials and the miners and made a determination of the approximate distances involved. In his report submitted on February 26, 1975, (Gov't Exhibit #2) Inspector Pritt stated in pertinent part:

> The Nos. 13, 25, and 23 drift portals serving the No. 6 mine [subsequently redesignated as the No. 6A Mine with respect to the No. 23 drift] are distances of 8 and 4 miles from the bathhouse facilities; therefore these facilities are not centrally located so as to be convenient for the use of miners at this time.

On February 24, 1974, Inspector Sonny A. Davenport issued a 104(b) notice of violation at the Carbon Fuel's No. 6 Mine, for violation of 30 CFR 75.1712-2. On March 14, 1975, Carbon Fuel applied for a waiver of the requirements of 75.1712-2 pursuant to 30 CFR §§ 75.1712-4 and 75.1712-5 (Gov't Exhibit #4) which application was denied by letter submitted to the company on April 17, 1975, from James Krese, District Manager of the Mining Enforcement and Safety Administration (Gov't Exhibit #4(a)). On May 6, 1975, Inspector Davenport modified his original notice to exclude the No. 6A Mine, since it was no longer part of the

No. 6 Mine. Inspector Davenport returned to the mine on May 22, 1975, and issued notice No. 3 S.A.D. (Gov't Exhibit #5) giving the operator until June 23, 1975, to abate the condition.

During the hearing there was testimony as to the meaning or interpretation definition of "convenient" and "centrally located" and as to the elements or factors considered in making a determination whether a bathhouse was in compliance with the requirements.

With respect to this determination, George M. Pritt, testified that MESA had established no guidelines for use in this area (Tr. 23). Moreover, Mr. Pritt stated that he had received no guidance from his supervisor, Mr. Weekley, the Subdistrict Manager (Tr. 65) and that he was not aware of any changes made in his report by persons at a higher level (Tr. 66).

Mr. Pritt indicated that the distance and driving time between the bathhouse and the mine portal concerned went into *his interpretation* (emphasis added) of the meaning of "convenient" (Tr. 20, 22). Mr. Pritt stated that the actual distance from the 23 Drift to the bathhouse was three miles and not the four miles stated and relied upon in his earlier investigation report and two Notices of Violation issued subsequently (Gov't Exhibits #2, #5, Tr. 22). Mr. Pritt distinguished between "completely convenient," "reasonably convenient," and "inconvenient," saying that he interpreted the present situation as "inconvenient to the extent that a man leaving the mine portal at this particular place would be subject to at times being wet, hot, dirty, tired—he'd have in the winter time a cold automobile to enter and drive fifteen minutes before he can arrive at a place to find facilities for washing, cleaning up, and put on dry, clean clothes" (Tr. 21-2).

Little or no help was given to Inspector Davenport by MESA guidelines, case law, or the legislative history of the Act. Therefore, the Inspector turned to his own experience

as a miner and the assistance of his supervisor, Inspector Pritt (MESA's Brief, 4, Tr. 132). Inspector Davenport stated that he used his own independent judgment in making a determination, that the location of bathhouse facilities were not convenient to the miners at the 6A portal (Tr. 128). *He defined* (emphasis added) "convenient", "as enabling a man to come out of the mine, take a shower and change clothes without having to get in his car and drive three miles" (Tr. 129). *He relied on Inspector Pritt's original investigation,* (emphasis added), and then made his own determination as to whether the violation existed (Tr. 129), although he did acknowledge the direction by Mr. Pritt for its issuance (Tr. 140). Among the factors he considered were: the distance from the bathhouse to the 6A portal, the time it took to travel that distance, the muddy and wet condition of the miners' clothes and the health and safety factors involved (Tr. 126, 131).

Mr. Pritt's understanding of the word "central" was that the distances from the portals to the bathhouse would be equal (Tr. 23). Mr. Pritt stated that although there were no guidelines on this particular point, he made a determination that the bathhouse would be reasonably convenient for those mine portals located within a two-mile radius thereof (Tr. 23) and, on this basis, he found in the course of his investigation that the bathhouse facilities were reasonably convenient for the use of the miners who enter the portals serving the No. 31, the No. 34 (Morton) mines, and the 31-2 drift, located at a distance of 2.1, 1.9, and 2.2 miles respectively (Tr. 57). On this same basis, the mine in the instant case, 23 Drift—located .8 miles farther away from the bathhouse facilities (3.0 miles in all, Applicant's Exhibit #1, Tr. 54), was found in the investigation report to be inconvenient for the use of the miners.

There was testimony that all but six of the miners at the No. 6 Mine [including the 23 Drift, now part of the No. 6A Mine] pass by the bathhouse (Gov't Exhibit # 2, Tr. 54).

Other roads which miners might use in traveling to and from work intersect with the paved road coming from the bathhouse at a distance of one mile (Tr. 48).

Mr. Pritt testified that the bathhouse facilities included, by his rough count, approximately 250 baskets plus a combination of 29 lockers and baskets (Tr. 14), but he later indicated that he would not dispute a total of 350 baskets plus the combination of 29 (Tr. 49). Government Exhibit No. 4 indicates that 23 Drift employs a total of 32 persons, however, testimony was given that indicates a total of 41 persons (Tr. 9). There was conflicting testimony as to the total number of miners who might use the bathhouse, ranging from approximately 268 (Tr. 173) to over 500 (Tr. 13).

Although there was testimony given on the elements or factors (including life of the mine (Tr. 70), distance from the existing bathhouse (Tr. 77), number of miners employed and on which shifts (Tr. 28), cost of a new facility (Tr. 77), additional compensation in lieu of bathhouse (Tr. 28, 69), and availability of water (Tr. 77)) which would be considered in determining whether or not a waiver would be granted pursuant to 30 CFR §§ 75.1712-4 and -5, such discussion is not entirely germane to the threshold issue of whether the bathhouse was centrally located so as to be convenient for the use of the miners and derivatively, whether the Notice of Violation was validly issued.

Based on the foregoing testimony and the exhibits introduced into evidence, I find that the Mining Enforcement and Safety Administration has failed to make out a prima facie case of a violation of 30 CFR 75.1712-2 and that the Notice of Violation No. 3 SAD, May 22, 1975 (Gov't Exhibit #5), was improperly issued.

In *Freeman Coal Mining Corporation,* 1 IBMA 1 (1970) at pages 27 and 28, the Board of Mine Operations Appeals stated:

> • • • We accept, at least for the purposes of the issues presently before us, the proposition that any

time for abatement is an unreasonable time if no violation exists. Hence, the truth of the Bureau's allegations of violation, and the legal sufficiency of the facts claimed to constitute a violation, may be challenged by an applicant seeking review of a section 104(b) notice.

The interpretation of "centrally located" as it is used in the regulation, while certainly involving the notion of reasonably uniform distance between a bathhouse and any mine portal which such facility is intended to serve, also includes the concept of centrality with respect to the travel route that the miners take in going to and from work since the balance of the provision adds "so as to be convenient for the use of the miners in all the mines served by such facilities." That this is a necessary consideration can be shown in a hypothetical situation where the bathhouse would be equidistant from several mines, yet the miners' homes or the road leading to them would be on the side of the mines that was opposite from the bathhouse. In such a situation the miners would all have to pass the area where the mines were located to go to the bathhouse and then in essence backtrack to get to the mines, repeating the duplicative process at the end of the shift. In the instant case, the evidence indicates that all but six of the miners working at the No. 6 Mine (which includes the after-designated No. 6A Mine) pass the bathhouse on the way to and from work (Gov't Exhibit #2).

Based on the evidence adduced at the hearing, I find the inspector's interpretations of "convenient for the use of the miners" to be vague and arbitrarily applied.

Both of MESA's witnesses stated that they had no guidelines to assist in the interpretation of the language of the Regulation (Tr. 23, 132).

Mr. Pritt, one of MESA's witnesses, testified that distance was a consideration in his interpretation of "convenient" (Tr. 20, 22), yet the evidence indicates that the

initial investigation report (Gov't Exhibit #2) as well as both the initial Notice of Violation No. 1 SAD, February 24, 1975 and the notice involved in the present proceeding, Notice No. 3 SAD, May 22, 1975, (Gov't Exhibit #5), issued because No. 6 Mine, 23 Drift was redesignated as the No. 6A Mine (Tr. 30), all used the erroneous figure of four miles instead of three miles as the distance from the bathhouse to the 23 Drift (Tr. 22). I do not intend to hold that the demarcation between convenient and inconvenient occurs at a precise mileage figure.

Mr. Davenport, MESA's other witness, testified that he interpreted "convenient" as "enabling a man to come out of the mine, take a shower and change clothes without having to get in his car and drive three miles" (Tr. 129). This interpretation renders meaningless the provision in the Regulation permitting one facility to serve more than one mine when coupled together with the experience of his supervisor, Mr. Pritt, which recalls no situation in which two mine portals were within walking distance (Tr. 98).

Mr. Pritt's interpretation that a bathhouse located 2.2 miles from a mine portal is convenient for those miners (Tr. 57) directly conflicts with Mr. Davenport's interpretation that a bathhouse is inconvenient if the miners who would use it have to drive to get to it (Tr. 151).

There was testimony that driving time was a factor in the interpretation of "convenient", yet estimates of the driving time ranged from seven and 15 minutes (Tr. 48, 11).

The safety of the miners while driving down from the portal to the bathhouse was given as a factor affected by the location of the bathing facilities in that in the cold weather a miner was liable to go over the bank or run into someone (Tr. 118, 131, 151), yet there was testimony that there is no knowledge of any accidents occurring on the road (Tr. 178) and that the bathhhouse's present location made it possible for the miners to ride together in some-

one's car to and from the mine, resulting in a reduction of traffic on the dirt road which is also used to truck coal (Tr. 180). It is difficult to perceive how the cited hypothetical danger of going over a bank or running into someone in cold weather could be eliminated by a centrally located bathhouse.

In discussing the present location of the bathhouse with respect to the health of the miners at the 23 Drift, Mr. Pritt admitted that he had no data which might show a correlation between distance from the portal to the bathhouse and the miners' health nor did he have any data which compared the health of the miners in 23 Drift with that of the miners working in mines situated closer to the bathhouse (Tr. 102). With respect to the health and safety factors involved, Mr. Davenport stated he never used bathing facilities at any of the mines after conducting an inspection, inspections that usually lasted four to five hours underground per day (Tr. 136), before returning to Montgomery, West Virginia, one hour's driving time from the present area (Tr. 137).

Mr. Philyaw's initial complaint (Gov't Exhibit #1) stated that it would be "much more convenient for the men" if a bathhouse were to be placed at each individual mine. The fact that such an arrangement would obviously be more comfortable does not indicate inconvenience under the terms of the regulation and in fact the language of the regulation precludes such a finding. The possibility of differing interpretations by inspections is illustrated by Supervisor Pritt's distinctions between absolutely convenient, reasonably convenient, and inconvenient. This flexible but vague approach to the matter is completely at variance with Inspector Davenport's approach that the bathhouse must be located within walking distance (Tr. 151).

It is clear from the language of the Regulation that it was not intended that there must be a separate bathhouse for each mine if the bathhouse meets the specified criteria.

The last sentence of the Regulation provides that where such facilities are designed to serve more than one mine, they shall be centrally located so as to be convenient for the use of the miners in all of the mines served by such facilities.

It is established by the evidence that none of the mine portals in this area were near enough to each other so that the miners could walk to a centrally located bathhouse and there was no evidence in the record to indicate that the miners could ordinarily do so in other mines in different areas. Such facilities are not required by the Regulation if they meet the other specified criteria.

In this case there seems to be little difference in the degree of convenience between the mine 2.2 miles from the bathhouse and the mine 3 miles from the bathhouse. In both instances the bad roads from the mines must be traveled in order to get to the improved road leading to the bathhouse. Once the improved road is reached and the car is heated, the additional .8 of a mile should make little difference in time or convenience.

The interpretation of "convenient" includes more than just consideration of distance and driving time. It also includes the elements of comfort and stability or continuity in working habits or patterns as well as safety or protection of the individual's personal effects. Applicant's witness, Mr. Lewis N. Thomas, Jr., Senior Vice President for Operations, testified that the present bathhouse was constructed with the element of continuity in mind—that the miners could continue to use the facilities as active operations progressed in the area surrounding the bathhouse (Tr. 160, 165). Mr. Thomas also stated that consideration was given to the protection of personal belongings when the bathhouse was situated across the road from the "company store" (Tr. 163).

The several briefs and proposed findings filed by the parties to these proceedings have been carefully reviewed.

To the extent that these post-hearing documents are inconsistent with the findings and conclusions set forth herein, they are rejected.

Since I find that there was no violation of 30 CFR 75.1712-2 the Petition for Modification of a Mandatory Standard thus becomes moot and will be dismissed without prejudice. Under this decision MESA's motions to consolidate the proceedings and to dismiss the Petition for Modification because 30 CFR 75.1712-2 is not a mandatory safety standard become meaningless.

Order

Accordingly, IT IS ORDERED THAT

(1) the Application for Review is Granted and the Notice of Violation No. 3 SAD, dated May 22, 1975, is hereby VACATED, and

(2) the Petition for Modification in the above-captioned proceedings is DISMISSED without prejudice.

/s/ FORREST E. STEWART
Forrest E. Stewart
Administrative Law Judge

Issued: July 22, 1975

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Standard Distribution

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No. 78-218

In the Supreme Court of the United States

OCTOBER TERM, 1978

CARBON FUEL COMPANY, PETITIONER

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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MEMORANDUM FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

Petitioner contends that the court of appeals erred in construing the administrative review provisions of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 *et seq.*, which provisions have been superseded by subsequent legislation. Federal Mine Safety and Health Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290 *et seq.*

1. Petitioner operates several coal mines in a mountainous area near Winifrede, West Virginia, and maintains a bathhouse two to three miles away from the various mine portals for the use of the miners (Pet. App. 26a-27a, 30a). On May 22, 1975, a federal coal mine inspector issued a notice of violation to petitioner under Section 104(b) of the Federal Coal Mine Health and

Safety Act of 1969, 30 U.S.C. 814(b) ("the 1969 Act"), charging that the bathhouse violated a mandatory health standard because it was not "centrally located so as to be * * * convenient for the use of the miners * * *." 30 C.F.R. 75.1712-2. The notice required petitioner to abate the violation—*i.e.*, to construct a new bathhouse convenient to the mine portal that was three miles away from the existing bathhouse—by June 23, 1975 (Pet. App. 29a).[1]

On June 2, 1975, petitioner sought administrative review of the unabated notice of violation under Section 105(a)(1) of the 1969 Act, 30 U.S.C. 815(a)(1), claiming that the location of the existing bathhouse did not conflict with the regulation (Pet. App. 24a). The Secretary granted review in accordance with his general practice.[2] On July 22, 1975, after an expedited hearing in which respondent United Mine Workers of America (UMW) intervened to defend the inspector's notice, the administrative law judge ruled that the location of the existing bathhouse complied with the mandatory health standard (Pet. App. 23a-36a). Accordingly, the judge set aside the inspector's notice of violation (Pet. App. 36a). This ruling was affirmed on February 20, 1976, by the Board of Mine Operations Appeals (Pet. App. 16a-21a), and thereby became the final decision of the Secretary of the Interior.

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[1]A second notice, concerning a mine located eight miles from the existing bathhouse, was not challenged by petitioner and is not at issue in this case (Pet. App. 28a).

[2]Meanwhile, the original abatement time specified in the notice of violation was extended to July 25, 1975, in order to permit the operator to obtain administrative review prior to constructing a new bathhouse (Pet. App. 26a).

Respondent UMW filed a petition for review in the court of appeals under Section 106 of the 1969 Act, 30 U.S.C. 816, contending that the Secretary (acting through his adjudicative delegates, the administrative law judge and the Board of Mine Operations Appeals), had no jurisdiction to vacate the inspector's notice of violation. The UMW also argued that, assuming the Secretary had properly reviewed the notice of violation, he erred on the merits in finding that the location of the bathhouse complied with applicable regulations. Petitioner intervened in the proceeding in support of the Secretary's decision.

The court of appeals reversed. It agreed with the UMW that Section 105(a)(1) of the 1969 Act, 30 U.S.C. 815(a)(1), limited administrative review of an unabated notice of violation to the question whether the time allowed for abatement was reasonable and that the section thus precluded immediate review of the question whether a violation existed (Pet. App. 9a-13a). The court construed the 1969 Act to require a mine operator who received a notice of a violation but believed that its operations were in full conformity with all applicable health and safety standards "either to abate the condition or to await transformation of the notice to a withdrawal order by a failure to abate, at which point [it] would have finally been entitled to challenge the existence of the violation" (Pet. App. 13a-14a; footnote omitted).

2. After a thorough review of the language and legislative history of the 1969 Act, the court of appeals concluded that a mine operator served with a notice of violation of mandatory health and safety standards that does not pose an imminent danger is compelled, if it chooses not to alter its operations, to subject itself to a withdrawal order—an order requiring it to withdraw

employees from the violation area—before it can obtain administrative review of the question whether the inspector correctly determined that a violation existed.[3] This holding finds some support in the wording of Section 105(a)(1) and in portions of the congressional reports. Moreover, the court's construction avoids subjecting "miners to continuing their labors—perhaps for a substantial period—under conditions which, though not thought to be imminently dangerous, were nonetheless believed to be unwholesome and in contravention of the Act's health and safety standards" (Pet. App. 14a; footnote omitted). On the other hand, the court of appeals' interpretation of the administrative review provisions of the 1969 Act works some hardship on mine operators, who may have to undertake unnecessary and perhaps costly improvements merely to be entitled to challenge the validity of a notice of violation, and it is inconsistent with the construction of the statute, albeit in *dicta,* by two other circuits. *Kanawha Coal Co.* v. *Andrus,* 553 F. 2d

[3]Review of the merits of the violation determination is clearly available under Section 105(a)(1) of the 1969 Act, 30 U.S.C. 815(a)(1), once a withdrawal order has issued under Section 104(b), 30 U.S.C. 814(b), for failure to abate a violation within the period fixed by the notice or by subsequent extensions (Pet. App. 13a-14a). Review of the merits is also available in a civil penalty proceeding under Section 109(a)(3) of the 1969 Act, 30 U.S.C. 819(a)(3), but such proceedings customarily take place after the violation has been abated, since the Secretary, in assessing the penalty, is required to consider "the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation" (Section 109(a)(1), 30 U.S.C. 819(a)(1)). In any event, under the plain language of Section 104(b), a withdrawal order must issue upon the operator's failure to abate the violation totally within the permitted time, without regard to whether a civil penalty proceeding had been instituted.

361 (4th Cir. 1977); *Lucas Coal Co.* v. *Interior Board of Mine Operations Appeals,* 522 F. 2d 581 (3d Cir. 1975).[4]

3. Whatever the proper interpretation of Section 105(a)(1) of the 1969 Act, there is no reason for this Court to grant review here. The 1969 Act has been amended by the Federal Mine Safety and Health Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290 *et seq.* ("the 1977 Act"), which became effective on March 9, 1978, and Section 105 of the 1969 Act has now been superseded by administrative review provisions in the new

[4]The issue in *Kanawha* was whether the adequacy of an abatement plan was subject to administrative review. The Fourth Circuit agreed with the Secretary that the adequacy of the plan was not immediately reviewable, but it observed that the operator could proceed with its plan and, if the Secretary issued a new notice alleging that the plan did not abate the violation, the operator could then seek review of the question whether a violation existed (553 F. 2d at 363). The court also stated (*ibid.*) that if the Secretary should issue a "closure" (withdrawal) order before the operator was able to obtain a hearing on the new notice, the operator could apply to the court for a stay of the order. In *Lucas,* the Secretary reviewed the merits of unabated violation notices but declined to terminate the notices, finding that the inspectors had correctly determined that violations existed. None of the parties in the court of appeals challenged the Secretary's jurisdiction, and since the court upheld the decision against the mine operator on the merits it had no occasion to consider whether the operator had been entitled to immediate administrative review. In reviewing another issue (whether abatement moots a notice of violation), however, the court discussed the statutory review scheme and stated that "the fact of violation is subject to section 105 review where the violation remains unabated" (522 F. 2d at 587).

A third court has suggested that a construction of Section 105 that prohibited immediate review of a notice of violation would raise serious problems under the Due Process Clause. *Lucas* v. *Morton,* 358 F. Supp. 900, 903-904 (W.D. Pa. 1973) (three-judge court). The court below did not address the constitutionality of the statutory scheme (Pet. App. 14a n.55).

statute. We know of only one pending case arising under the 1969 Act that might be affected by the holding of the court below,[5] and the effect of this holding on cases arising under the 1977 Act is speculative. As petitioner points out (Pet. 14-15), some administrative law judges, in cases somewhat similar to the present case, have followed the court of appeals' ruling in determining the scope of administrative review of violation notices (termed "citations") under the applicable provision of the 1977 Act, Pub. L. No. 95-164, Section 201, 91 Stat. 1305-1306.[6] Those decisions, however, are subject to discretionary review by the Federal Mine Safety and Health Review Commission, the independent adjudicative body established by Section 201 of the 1977 Act, 91 Stat. 1314, and thereafter by the courts of appeals.[7] At this time, neither the Commission nor any court has addressed the question whether the different language of the administrative review provision in the 1977 Act represents a substantive change from Section

[5] *Mullins* v. *Andrus*, petition for review pending, No. 77-1086 (D.C. Cir.).

[6] In the cases cited by petitioner, the violations had been abated, and the operators were seeking review of the merits of the citations prior to the institution of civil penalty proceedings.

[7] The Commission, including its administrative law judges, now exercises the administrative review functions performed by the Secretary of the Interior through his adjudicative delegates under the 1969 Act. The administrative law judges formerly assigned to the Office of Hearings and Appeals in the Department of the Interior were automatically transferred to the Commission upon the effective date of the 1977 Act. The Secretary of Labor, rather than the Secretary of the Interior, is now responsible for enforcement of mine safety and health standards. See Pub. L. No. 95-164, Sections 102 and 201, 91 Stat. 1290-1291, 1313-1315.

105(a)(1) of the 1969 Act.[8] Until the review section of the 1977 Act has been construed by the Commission and the lower courts, there is no need for this Court to consider the question.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

SEPTEMBER 1978

[8] The court of appeals correctly noted (Pet. App. 3a n.3) that it had "no call to construe the 1977 Act" since that statute was inapplicable to the present case.

DOJ-1978-09

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-218

CARBON FUEL COMPANY, *Petitioner,*

v.

CECIL D. ANDRUS, Secretary of the Interior, and UNITED MINE WORKERS OF AMERICA, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT UNITED MINE WORKERS OF AMERICA

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IN THE

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CARBON FUEL COMPANY, *Petitioner,*

v.

CECIL D. ANDRUS, Secretary of the Interior, and UNITED MINE WORKERS OF AMERICA, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENT UNITED MINE WORKERS OF AMERICA

Respondent United Mine Workers of America (UMWA) hereby answers in opposition to the petition for a writ of certiorari.

QUESTIONS PRESENTED FOR REVIEW

1. Did now-amended-and-superseded § 105 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 815 (1970), not only empower adjudicative bodies to modify abatement periods allowed in warning notices issued under now-amended-and-superseded 30 U.S.C. § 814(b) (1970), but also create a power to review and set aside, on the merits, the more than

100,000 such warnings issued each year by federal coal mine inspectors?

2. Should this Court consider the petitioner's new contention with respect to the alleged unconstitutionality of now-amended-and-superseded 30 U.S.C. § 815 (1970), even though it was not properly presented to and not considered by the Court of Appeals, having not been presented until the petitioner requested a rehearing two weeks after the Court of Appeals rendered its decision?

3. Should this Court attempt to influence the resolution of a conflict of decision between administrative law judges of the new Federal Mine Safety and Health Review Commission as to the scope of new 30 U.S.C.A. § 815(d) (1978 pocket part)—before the just-appointed Commission has considered the conflict, before any Court of Appeals or District Court has been able to review whatever the Commission may decide, and even though the Court of Appeals herein did not render any holding on that question?

STATUTES INVOLVED

Section 104(b) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 814(b) (1970):

> "(b) Except as provided in subsection (i) of this section, if, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard but the violation has not created an imminent danger, he shall issue a notice to the operator or his agent fixing a reasonable time for the abatement of the violation. If upon the expiration of the period of time as originally fixed or subsequently extended, an authorized representative of the Secretary finds that the violation has not been totally abated, and if he also finds that the period of time should not be further extended, he shall find the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that the violation has been abated."

Section 105 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 815 (1970):

> "(a) (1) An operator issued an order pursuant to the provisions of section 814 of this title, or any representative of miners in any mine affected by such order or by any modification or termination of such order, may apply to the Secretary for review of the order within thirty days of receipt thereof or within thirty days of its modification or termination. An operator issued a notice pursuant to section 814(b) or (i) of this title, or any representative of miners in any mine affected by such notice, may, if he believes that the period of time fixed in such notice for the abatement of the violation is unreasonable, apply to the Secretary for review of the notice within thirty days of the receipt thereof. The applicant shall send a copy of such application to the representative of miners in the affected mine, or the operator, as appropriate. Upon receipt of such application, the Secretary shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing, at the request of the operator or the representative of miners in such mine, to enable the operator and the representative of miners in such mine to present information relating to the issuance and continuance of such order or the modification or termi-

nation thereof or to the time fixed in such notice. The filing of an application for review under this subsection shall not operate as a stay of any order or notice.

"(2) The operator and the representative of the miners shall be given written notice of the time and place of the hearing at least five days prior to the hearing. Any such hearing shall be of record and shall be subject to section 554 of Title 5.

"(b) Upon receiving the report of such investigation, the Secretary shall make findings of fact, and he shall issue a written decision, incorporating therein an order vacating, affirming, modifying, or terminating the order, or the modification or termination of such order, or the notice, complained of and incorporate his findings therein.

"(c) In view of the urgent need for prompt decision of matters submitted to the Secretary under this section, all actions which the Secretary takes under this section shall be taken as promptly as practicable, consistent with adequate consideration of the issues involved.

"(d) Pending completion of the investigation required by this section, the applicant may file with the Secretary a written request that the Secretary grant temporary relief (1) from any modification or termination of any order, or (2) from any order issued under section 814 of this title, except an order issued under section 814(a) of this title, together with a detailed statement giving reasons for granting such relief. The Secretary may grant such relief, under such conditions as he may prescribe, if—

(1) a hearing has been held in which all parties were given an opportunity to be heard;

(2) the applicant shows that there is substantial likelihood that the findings of the Secretary will be favorable to the applicant; and

(3) such relief will not adversely affect the health and safety of miners in the coal mine.

No temporary relief shall be granted in the case of a notice issued under section 814(b) or (i) of this title."

STATEMENT OF THE CASE

Petitioner Carbon Fuel Company (Carbon) seeks review of a decision of the United States Court of Appeals for the District of Columbia Circuit (McGowan, Robinson and Wilkey, JJ.), vacating an order entered on behalf of the Secretary of the Interior by his former adjudicative delegate, the now-abolished Interior Board of Mine Operations Appeals. The Interior Board's order affirmed an earlier order of an Interior Department administrative law judge (ALJ), which order had vacated a violation warning notice issued to Carbon by a federal coal mine inspector under § 104(b) of the Federal Coal Mine Health and Safety Act of 1969 (1969 Act), 30 U.S.C. § 814(b) (1970). The ALJ purportedly entered his order under the 1969 Act's § 105, 30 U.S.C. § 815 (1970). The § 814 (b) warning notice had been issued to Carbon during a health inspection requested pursuant to 30 U.S.C. § 813(g) (1970) by respondent United Mine Workers of America (UMWA). As the collective bargaining and safety representative of Carbon's non-supervisory coal mining personnel, the UMWA was a statutory party before the ALJ and the Interior Board, and was the appellant in the Court of Appeals.

Under §§ 103(a) and (g) of the 1969 Act, 30 U.S.C. §§ 813(a) & (g) (1970), Interior Department inspectors meeting expertise requirements set out in that Act's § 505, 30 U.S.C. § 954 (1970), were to make fre-

quent inspections of the nation's coal mines. An inspector who found a condition constituting an "imminent danger" was to order immediate evacuation of the "affected area" of the mine until the danger ceased.[1] 30 U.S.C. § 814(a) (1970). An inspector finding an unsafe or unhealthful condition which both violated a federal safety or health standard and constituted a less than "imminent" danger was to issue a notice, warning that evacuation of the "affected area" would be ordered unless the mine operator abated the cited condition within a fixed "reasonable" period.[2] 30 U.S.C. § 814(b) (1970). Other kinds of warning notices were issued pursuant to 30 U.S.C. § 814(i) (1970), and other kinds of "affected area" evacuation orders under 30 U.S.C. §§ 814(c), (h) & (i) (1970). And, subject to administrative and de novo court review, civil penalties were assessed for all violations found in warning notices and evacuation orders. 30 U.S.C. § 819 (a) (1970); see *NICOA* v. *Kleppe*, 423 U.S. 388 (1976).

Some review of warning notices and evacuation orders was provided in the 1969 Act's §§ 105 and 106, 30 U.S.C. §§ 815 & 816 (1970)—the question presented by this case is how much review was provided. A person aggrieved by an evacuation order could "apply . . . for review of the order" under 30 U.S.C. § 815(a) (1) (1970), and anyone aggrieved by a warning notice could, "if he believe[d] that the period of time fixed in [the] notice for abatement of the violation [was]

[1] An "imminent danger" was defined in 30 U.S.C. § 802(j) (1970).

[2] Interim health and safety standards were set out at 30 U.S.C. §§ 841-46 & 862-78 (1970), while improved standards were to be promulgated following procedures outlined in 30 U.S.C. § 811 (1970).

unreasonable, apply . . . for review of the notice" under the same section. Sections 105(d) and 106(c)(1), 30 U.S.C. §§ 815(d) & 816(c)(1) (1970), allowed temporary *pendente lite* relief from some types of evacuation orders, including 30 U.S.C. § 814(b) (1970) orders issued for failure to abate conditions cited in § 814(b) warning notices. At the same time, those sections prohibited temporary relief from imminent danger evacuation orders, as well as from warning notices themselves. 30 U.S.C. § 815(d) (1970) recognized "the urgent need for prompt decision" of cases submitted under § 815, requiring Interior Department administrative personnel to act in them "as promptly as possible."

The events in this particular action began in February 1975, when a federal mine inspector with 17 years of experience in the coal industry, in collaboration with another with 40 years of experience, issued § 814 (b) violation warnings to Carbon at two of its mines in Kanawha County, West Virginia. Carbon was given a month to abate, being warned that if it failed to eliminate the conditions found by the inspectors to constitute violations within that period, evacuation of the "affected areas" would be ordered.[3] Carbon promptly applied for relief from one of the two notices[4] to the ALJ below, who vacated it on the merits

[3] The inspectors found that conditions at the two mines violated the federal standard set out at 30 C.F.R. § 75.1712-2, which requires coal mine operators to provide "convenient" facilities for bathing and changing clothes for each mine.

[4] Carbon had been cited for providing "inconvenient" bathing facilities eight miles from one mine and three miles from another. It appealed from the warning given at the mine three miles from facilities.

(*Continued on following page*)

following an evidentiary hearing, and who was subsequently affirmed by the Interior Board.[8]

The ALJ's decision was predicated upon his finding that 30 U.S.C. § 815 (1970) not only gave him authority to shorten or lengthen the abatement period allowed in the challenged warning notice, but also authorized him to vacate the notice on the merits. Petition at 31a-32a. Section 815(a) provided, again, that an aggrieved person could, "if he believe[d] that the period of time fixed in [a] notice for abatement of [a] violation [was] unreasonable, apply . . . for review of the notice." The ALJ's theory, based upon *dicta* in an earlier Interior Board decision, was that "any time for abatement is an unreasonable time if no violation exists." *Id.* The

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The inspectors testified that winter temperatures in the area of the latter mine were "sub-zero," that it was "very muddy and wet" in the mine, and that the miners would therefore get muddy and wet from working in it.

To reach bathing facilities and clean clothes from their underground workplaces, the miners would have to get to the surface, then get into and warm up their automobiles, and then drive three miles—two of which were down a rough and narrow dirt road. The drive took seven to fifteen minutes, depending upon the season, the condition of the road, and how fast one drove.

The inspectors added that they would have also cited Carbon for violations at other mines two miles from bathing and changing facilities, but for the fact that the other mines were old and thus close to being abandoned, while the cited mine was less than a year old (opened Spring 1974).

[8] The ALJ in essence found that the inspectors had been impermissibly "arbitrary" because they had not also cited Carbon for violations at its older mines. He also found that the inspectors health-related testimony was inadequate because they had "no data" showing the harmful effects of prolonged exposure to the elements when one is wet, muddy and tired. The Interior Board affirmed on the ALJ's theory that the inspectors had been "arbitrary."

Interior Board did not discuss the scope of § 815 in its affirmance.

On appeal by the UMWA pursuant to 30 U.S.C. § 816 (a) (1970), the Court of Appeals reversed, holding that the ALJ erred in finding that he had the power to vacate the notice. After studying the statutory language and the legislative history, the Court concluded that § 815 merely created authority to modify a warning notice's abatement period. Petition at 7a-15a. The Court therefore had no need to consider the UMWA's challenge to the ALJ's holding on the merits, and did not do so. *Id.* at 7a, n. 24. Nor did it "pass on" the "constitutionality of the statutory scheme," since "no issue ha[d] been raised concerning [it]." *Id.* at 14a, n. 55. Carbon's petition for rehearing, attempting to raise a constitutional objection for the first time, was quickly denied.

In its decision, the Court of Appeals observed that it was "speak[ing] largely to the past" because the applicable provisions of the 1969 Act had been amended and superseded by new legislative provisions "cast in substantially modified language." *Id.* at 2a and at 3a, n.3. The Court was referring to provisions of the new Federal Mine Safety and Health Amendments Act of 1977, Public Law 95-164 (Nov. 9, 1977), 30 U.S.C.A. § 801 *et seq.* (1978 pocket part), which became effective on March 8, 1978. The Court further observed that since the 1977 Act's provisions were expressly made inapplicable to proceedings pending on the date it became effective by 30 U.S.C.A. §§ 961(c)(3-4) (1978 pocket part), the Court had "no call to construe the 1977 Act itself." *Id.* at 3a, n. 3. The Court added that "nothing" in the language or legislative history of the 1977 Act "modifie[d]" its "view of how Congress contemplated

that the 1969 Act would operate on the matter here at issue." *Id.*

REASONS FOR DENYING THE WRIT

Petitioner Carbon Fuel Company asks this Court to review the decision of the Court of Appeals because of the alleged existence of three of the possible grounds for certiorari review enumerated in this Court's Rule 19(1)(b). In the words of the Rule, Carbon alleges that the Court of Appeals "decided an important question of federal law which has not been, but should be, settled by this Court"; "decided a federal question in a way in conflict with applicable decisions of this Court"; and "rendered a decision in conflict with the decision of another court of appeals on the same matter."[*] In reality, however, none of the three enumerated grounds are actually present here. Moreover, the federal law question decided below has now become so unimportant that review should be denied even if this Court finds a decisional conflict.

I. The Federal Law Question Decided Below Is No Longer Important.

Contrary to the petition, the question decided by the Court of Appeals is no longer an important question of federal law. Indeed, Carbon does not even bother try-

[*] Carbon also contends that certiorari review should be granted because the decision below allegedly conflicts with a district court decision, and because it conflicts with an earlier decision of the agency whose order was reversed by the Court of Appeals' decision.

However, this Court does not grant review to resolve decisional conflicts between the courts of appeals and the district courts. Nor, needless to say, does it grant review to resolve "conflicts" between courts and agencies whose decisions they are empowered to review.

ing to allege that the question the Court actually decided—the scope of now-superseded 30 U.S.C. § 815 (1970)—is itself of any importance. Rather, Carbon asks for review because of the alleged importance of another question which the Court of Appeals, in its own words, had "no call" to consider. Petition at 3a, n. 3. Namely the scope of new 30 U.S.C.A. § 815(d) (1978 pocket part).

According to Carbon, the decision of the Court of Appeals contains *dicta* indicating a belief that new § 815(d) did not create any power to vacate warning notices issued under new 30 U.S.C.A. § 814(a) (1978 pocket part). Carbon claims that some of the administrative law judges of the new Federal Mine Safety and Health Review Commission have "followed the Court of Appeals' decision" when dismissing challenges to the merits of such notices. Carbon fears that the decision below "will continue to be used as a basis for limiting review" of such notices.

The short answer to Carbon's theory is that this Court simply does not review *dicta* of any kind. Nor does it review unimportant questions, even where resolution of such questions by this Court might possibly have some impact on lower courts and agencies in their consideration of other, important questions. The possible impact that resolution of one question will have upon the resolution of another different question is always speculative. And there may well be no impact at all, which renders any resolution of the first question a waste of the limited resources of all concerned. Moreover, it is safe to say that in the great majority of situations, important but unripe questions of federal law will be correctly resolved without decisional con-

flict by the nation's excellent lower courts, without any need for guidance from this Court.

This Court's wisdom in limiting its review to important questions is plainly demonstrated by the facts here. Even if this Court were to grant review of this case and decide the scope of old § 815, the lower courts and agencies would not in any way be bound to hold that the scope of new § 815(d) is identical. As the Court of Appeals noted, the relevant statutory language has been "substantially modified." Petition at 3a, n. 3. There is new legislative history as well, as there always will be when a statute has been amended. In short, the possible impact of review on the resolution of questions not presented here is merely speculative.

Moreover, Carbon's theory is based upon a misunderstanding of what the decision of the Court of Appeals says. In reality, the Court expressly refrained from declaring how it would have decided the scope of new § 815(d)—a question neither presented nor briefed—expressly observing that it had "no call" to do so. *Id.* It neither indicated how it would have dealt with new § 815(d)'s language and legislative history, nor how it would have dealt with a due process argument like that advanced for the first time by Carbon here. See Petition at 2a-3a incl. n. 3, and at 14a incl. n. 55. Indeed, the Court expressly declined to indicate how it would have decided the scope of *old* § 815 if a due process argument had been presented. Petition at 14a, n. 55.

Also, Carbon neglects to point out that while some ALJs of the new Commission have in fact dismissed challenges to the merits of warning notices filed under new § 815(d), other Commission ALJs have declined to do so. They have held that they *do* have the power to consider such challenges, notwithstanding the decision

below here. See, *e.g., Iselin Preparation Co.* v. *MSHA,* Commission Docket Nos. PITT 78-343 & 78-344 (1978). No one can be absolutely certain of how the Commission will resolve that conflict, nor of how the various Courts of Appeals will decide any challenges to whatever the Commission may decide. Hence, Carbon's claim that the Court of Appeals' decision will "be used as a basis for limiting review" of warning notices is likewise speculative.

II. There Is No Conflict of Decision.

1. Contrary to Carbon's petition, the decision of the Court of Appeals in no way conflicts with anything this Court decided in *NICOA* v. *Kleppe,* 423 U.S. 388 (1976), where this Court in fact affirmed a decision of the same Circuit—494 F.2d 987 (D.C. Cir. 1974). In *NICOA* this Court only decided whether hearings and formal findings of fact were required in uncontested civil penalty proceedings under now-superseded 30 U.S.C. § 819(a) (1970).[7] See 423 U.S. at 690, 693. In contrast, the Court below only decided whether now-superseded 30 U.S.C. § 815 (1970) created adjudicative power to vacate warning notices issued under now-superseded 30 U.S.C. § 814(b) (1970). In short, the Court of Appeals only decided the scope of § 815, while this Court in *NICOA* only decided the scope of § 819 (a)—an entirely unrelated question.[8]

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[7] The successor provisions to old § 819(a) are set out at 30 U.S.C.A. §§ 815(a), 816(a-b), 820(a, i-k) & 821(d) (1978 pocket part).

[8] If anything, the decision below is in complete accord with the spirit of *NICOA*. There this Court followed Congressional intent to do away with "complex procedural provisions relating to inspections, appeals, and the postponing of orders," which had previously made it "exceedingly difficult" to "carry out an effective enforcement program" in the mine safety area. 423 U.S. at 399.

Carbon's argument to the contrary is based upon language in *NICOA* where this Court was accurately describing how the Interior Department was interpreting § 815 at the time *NICOA* was decided. The description was part of this Court's general introductory description of how the 1969 Act was then operating. However, this Court had no occasion to rule upon the correctness of how the Act was generally operating, or upon how the Department interpreted § 815, and it clearly did not do so. No question concerning § 815 was presented in *NICOA*; *NICOA* did not decide the scope of any provision of the 1969 Act other than 30 U.S.C. § 819(a) (1970).

2. Similarly, the decision of the Court of Appeals does not conflict with anything decided in *Kanawha Coal Co.* v. *Andrus,* 553 F.2d 361 (4th Cir. 1976), or in *Lucas Coal Co.* v. *IBMA,* 522 F.2d 581 (3d Cir. 1975). Like this Court, the Third and Fourth Circuits have not had occasion to decide whether § 815 created adjudicative power to vacate warning notices on their merits. Nor have they done so.

In *Kanawha,* for example, the Fourth Circuit actually affirmed an Interior Board decision dismissing part of a mine operator's § 815 administrative complaint on procedural grounds. The dismissed portion of the complaint did not challenge anything done at the time a federal inspector issued the warning notice at issue, instead asking that the notice be terminated because the cited conditions had allegedly been abated *after* the notice was issued. The operator was afraid that an inspector might come to its mine at the end of the abatement period, might then conclude that the violative conditions had not been abated, and might thereupon issue an evacuation order.

In other words, the operator in *Kanawha* was not asking for "review" of anything already done by the agency, but rather for purely anticipatory relief. And the Fourth Circuit merely decided that § 815 *did not* create adjudicative power to terminate warning notices because of events occurring subsequent to their issuance.

3. Like the Fourth Circuit in *Kanawha,* the Third Circuit in *Lucas* actually affirmed an Interior Board decision dismissing a mine operator's challenge to § 814(b) activity. Thus, like this Court and the Fourth Circuit, the Third Circuit has never approved any exercise of the alleged § 815 power to vacate § 814(b) violation notices.

One part of *Lucas* involved challenges to the merits of several warning notices which had already been terminated due to abatement of the cited conditions. The Third Circuit affirmed the Interior Board's dismissal of that part of the affected operator's complaint as moot, thereby deciding that § 815 *did not* create adjudicative power to vacate warning notices already terminated by federal mine inspectors.

The other part of *Lucas* dealt with the operator's attack on the merits of several § 814(b) notices which were still in effect. The Interior Board denied those challenges on the merits, and the Third Circuit affirmed *without* deciding, or even considering, whether the notices could have been vacated if the Board's decision on the merits had been different. Not surprisingly, that question was not raised by either of the two parties before the Court in *Lucas*—neither by the Board itself, nor by the mine operator, who wanted

notices set aside. All the Third Circuit thus decided in the second part of *Lucas* was that the cited violations had in fact occurred.

III. The Petitioner's Primary Contention on the Merits Was Not Timely Presented to the Court of Appeals, and Therefore Was Never Considered Below.

On the merits, Carbon's chief argument appears to be that the scope of 30 U.S.C. § 815 (1970) must be widened by judicial action in order to preserve its constitutionality under the Due Process Clause of the Fifth Amendment. However, Carbon cannot properly present its due process argument to this Court, since it was not timely presented to the Court of Appeals, and the Court of Appeals therefore never considered it. In its decision, the Court of Appeals specifically noted that "no issue ha[d] been raised [before it] concerning the constitutionality of the statutory scheme," so that Court "d[id] not pass on it." Petition at 14a, n. 55. Carbon did not attempt to make any sort of constitutional argument until it filed a petition for rehearing two weeks after the Court of Appeals handed down its decision.

It is well established that this Court does not grant review to consider contentions not properly raised in the lower Courts. *Electrical Workers Local 790* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 235 n. 7 (1976); *Neely* v. *Martin K. Ely Construction Co.*, 386 U.S. 317, 330 (1967); *California* v. *Taylor*, 353 U.S. 553, 556-557 n. 2 (1957). This Court only grants review to consider matters which lower courts have "decided." By definition, this Court cannot "review" any contention not previously subject to "view" elsewhere.

IV. The Decision of the Court of Appeals Is Correct.

1. Review should also be denied because the decision of the Court of Appeals is clearly correct. The Court carefully considered all of the language and all of the legislative history of 30 U.S.C. § 815 (1970)—something the Interior Board never did (see Petition at 11a-12a)—and reached the only conclusion possible after such an analysis. The Court's decision speaks for itself, and needs no further explication.

To be sure, Carbon tries to argue that the Court's decision is contrary to § 815's plain words. But Carbon can do so only by giving disingenuous meanings to some "words," and by failing to quote others which contradict its position. Furthermore, Carbon does not even address a legislative history which the Court of Appeals found to be "unambiguous," "strong," "straightforward," and directly contrary to what Carbon proposes argument.

2. Carbon's simplistic due process argument is likewise wrong. Carbon contends that the Fifth Amendment always requires an adjudicative hearing before anyone can be deprived of any kind of property interest. Accordingly, Carbon argues that § 815 was unconstitutional as enacted because, without prior hearings before administrative law judges on the merits, it allowed federal mine inspectors to order evacuation of areas of mines affected by conditions found to constitute violations of health and safety standards.

In reality, however, the Due Process Clause does not always require advance hearings prior to infringements of property interests. Rather, as numerous decisions of this Court indicate, it merely requires some kind of a hearing at a meaningful time and in a meaningful

manner. The 1969 Act gave extensive procedural protection to recipients of warning notices issued under 30 U.S.C. § 814(b) (1970). That protection went far beyond meeting minimum due process requirements, as clearly indicated by a comparison of the procedures here with those approved of in such recent decisions as *Mathews* v. *Eldridge,* 424 U.S. 319 (1976), *Goss* v. *Lopez,* 419 U.S. 565 (1975), and *Mitchell* v. *W.T. Grant Co.,* 416 U.S. 600 (1974).[9]

Under the 1969 Act, a mine operator who received one of the more than 100,000 warning notices issued each year was thereby given complete and timely advance notice of a possible future evacuation order. The 1969 Act required all notices to describe the cited conditions in detail, so that the operators would know exactly what they had to abate. 30 U.S.C. § 814(e) (1970). The notices were to allow "reasonable" abatement periods, and the periods set were reviewable in proceedings before administrative law judges. 30 U.S.C. §§ 814 (b) & 815(a) (1970).

By its own terms, warning notices and evacuation orders issued pursuant to § 814(b) could only be issued by neutral federal mine inspectors in the public service, and not by interested private parties. Notices and orders could only be based upon conditions personally observed by the inspectors during the exercise of their duties, § 814(b), and the inspectors had to possess the expertise required by 30 U.S.C. § 954 (1970). In lieu of

[9] As the Court of Appeals observed, Carbon's proposed alternative to the statutory system would have required miners to continue their labors under conditions "believed to be unwholesome and in contravention of the Act's health and safety standards." Petition at 14a.

issuing evacuation orders when abatement deadlines were not met, the inspectors could grant additional abatement time where warranted. § 814(b).

Once a § 814(b) evacuation order had been issued, the affected operator had an immediate right to file for a full hearing on the merits before an administrative law judge. 30 U.S.C. § 815(a) (1970). Such hearings were to be held "as promptly as practicable," and temporary pendente lite relief was available. 30 U.S.C. §§ 815(c-d) (1970).

The evacuation orders were limited in scope and duration. They only covered the "affected areas" of the operators' mines, and they only remained in effect until the cited conditions were abated. § 814(b). The mines remained in the possession of the operators at all times, as did their coal, and the coal was still there to be mined once abatement was achieved. Nothing was removed, nothing was destroyed,[10] and no one was deprived of any of the necessities of human life.

[10] Compare *Miles* v. *District of Columbia,* 510 F.2d 188 (D.C. Cir. 1975), cited by Carbon at page 13 of the petition, where property was actually going to be destroyed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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